Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JON A. JENSEN, JANE DOE JENSEN
and the marital community thereof,

Petitioners,

v.

PAUL A. STOOT, SR. and TAMMIE L. STOOT,
husband and wife, and as parents and guardians of
Paul A. Stoot II; and PAUL A. STOOT II, a minor child,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Amendment of the United States Constitution prohibits the use of involuntary confes-sions in a "criminal case." The question presented is whether "criminal case" means the entire criminal process beginning with the filing of charges or whether "criminal case" means the actual criminal trial.

PARTIES

The petitioners are defendants Jon A. Jensen, Jane Doe Jensen, and the marital community thereof.

The respondents are Paul A. Stoot, Sr. and Tammie L. Stoot, husband and wife, and as the parents and guardians of Paul A. Stoot II; and Paul A. Stoot II.

The City of Everett was also a party to the proceedings below, but the Ninth Circuit affirmed the dismissal of all claims against the City.

There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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Detective Jon A. Jensen, retired, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009) (App. 1a). The order of the United States District Court for the Western District of Washington is unpublished (App. 47a).

JURISDICTION

The judgment of the Court of Appeals, as amended, was entered on September 18, 2009. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself[.]

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be

> subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

INTRODUCTION

Paul Stoot II ("Stoot") confessed to Detective Jon A. Jensen that he had molested a three-year-old girl. App. at 2a, 9a, 53a. Based in part on this confession, Stoot was charged with child molestation. App. at 2a, 12a. After a lengthy suppression hearing that included testimony from expert witnesses, a state trial court judge in juvenile court (the "Juvenile Court Judge") determined that Stoot did not understand his rights and his confession was involuntary. App. at 53a-54a. The Juvenile Court Judge also entered a finding that "it would have appeared to Detective Jensen that [Stoot] understood his rights[.]" App. at 13a, 70a-71a. The charges were subsequently dismissed, and Stoot was never taken into custody.

Stoot then filed a lawsuit against Detective Jensen and his employer, the City of Everett, which included a § 1983 claim alleging Stoot's Fifth Amendment rights had been violated. App. at 15a.

Detective Jensen was careful to respect Stoot's Fifth Amendment rights. He conferred with two county prosecutors before interviewing Stoot. App. at 7a-8a.

He read Stoot his *Miranda*[1] warnings and had Stoot read and sign a written waiver form. App. at 8a-9a. Stoot did not give any outward indication that he did not understand his rights and never asked for his parents or an attorney. See App. at 52a. When Stoot was writing out his confession, Detective Jensen even learned that Stoot was an honors student. App. at 51a. Detective Jensen included the confession in his report, which the county prosecutor used as part of the basis for filing charges against Stoot.

Despite this uncontested evidence, the Ninth Circuit held that Detective Jensen may have violated Stoot's Fifth Amendment rights and was not entitled to qualified immunity. App. at 3a. The Ninth Circuit's holding was based on its ruling that a "criminal case" under the Fifth Amendment begins once charges are filed. App. at 33a.

The Court should grant the petition for certiorari to review this holding for two reasons. *First*, there is a conflict between the federal circuits that the Court should resolve. *See* Sup. Ct .R. 10(a). The ruling by the Ninth Circuit (joining the Second and Seventh Circuits) conflicts rulings from three other federal circuits (the Third, Fourth, and Fifth), which have previously found that a "criminal case" means a "criminal trial." *Second*, this case involves an important undecided question of federal law about the meaning of a phrase in the U.S. Constitution – "criminal case" – that should be settled by the Court. *See* Sup. Ct. R. 10(c). If the Ninth Circuit's holding is allowed to stand, it will have a chilling effect on all law enforcement officers preparing to conduct custodial interrogations.

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1. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

STATEMENT

This case originated from a complaint by a four-year-old girl, A.B., who reported to her mother that she had been molested by Stoot a year earlier when she was three years old and living with Stoot at his parents' home. App. at 4a. As part of his investigation, Detective Jensen interviewed Stoot, who confessed. After this confession was suppressed and the charges were dropped, Stoot filed a lawsuit against Detective Jensen and the City of Everett that included a § 1983 claim based on an alleged Fifth Amendment violation. This claim was dismissed on summary judgment by the district court, but re-instated by the United States Court of Appeals for the Ninth Circuit.

A. Detective Jensen Acted on Credible Evidence Showing that Stoot Had Molested a Three-Year-Old Girl

On December 23, 2003, the mother of the alleged victim A.B. first reported the alleged molestation to Everett Police Officer Anders, who interviewed A.B.'s mother and had her write out a formal complaint detailing how she had observed A.B. touching herself, how this behavior prompted her to question A.B. about her conduct, and how A.B. explained to her mother that Stoot had touched her. App. at 4a, 48a-49a. The written complaint and Officer Anders's report was then provided to Detective Jensen. App. at 49a.

At the time the case was assigned to Detective Jensen, he was a 24-year veteran of the Everett Police Department and had worked in the Special Assault Unit

for 5 years. App. at 5a. He had undergone approximately 280 hours of specialized training devoted to investigating child sexual assault cases. App. at 49a. He also had 32 hours of specialized training for child-interview techniques and had conducted numerous child interviews. App. at 49a.

Detective Jensen started his investigation by interviewing A.B.'s mother and determining that she had not used leading questions or planted any details about the alleged molestation. App. at 5a. He also confirmed with A.B.'s mother that A.B. had lived with Stoot and his family during the time period that the alleged molestation occurred.[2] App. at 4a, 7a. He then interviewed A.B.

During the interview, Detective Jensen evaluated A.B.'s ability to communicate. He determined that A.B. had an average to above-average intelligence and possessed excellent communication skills for a child of her age. App. at 49a. She also seemed truthful throughout the interview. App. at 49a.

A.B. provided details, expressed in age-appropriate terms, that suggested specialized sexual knowledge during the interview.[3] *See* App. at 6a, 49a-50a. She told

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2. While the Ninth Circuit criticized Detective Jensen for not confirming this fact with a third party, it is uncontested that A.B. did in fact live with Stoot's family during the period the molestation was alleged to have occurred. App. at 7a n.1.

3. *See State v. C.J.*, 63 P.3d 765, 772 (Wash. 2003) (noting specialized sexual knowledge expressed in age-appropriate terms and masturbatory behavior can serve as corroboration of a young child's testimony).

Detective Jensen that Stoot had molested her on several occasions. App. at 49a-50a.

B. Detective Jensen Consulted with Legal Counsel before Interviewing Stoot to Ensure He Complied with All Legal Requirements for Questioning Minors

Following the interview, Detective Jensen prepared to interview Stoot, then 13 years old.[4] App. at 48a. To make sure he was up-to-date on the legal requirements for interviewing child-suspects, Detective Jensen spoke with two Snohomish County prosecutors. App. at 7a-8a.

The prosecutors informed Detective Jensen that he could interview Stoot without his parents present, but that he must treat a request by Stoot to have his parents present just like a request for counsel, that he must read Stoot his *Miranda* warnings, and that he should proceed only if Stoot signed a written waiver of rights. App. at 8a.

This guidance accurately reflected Washington law at the time Detective Jensen interviewed Stoot. A minor over age 12 could be interviewed without his parents present and was deemed to have the capacity to waive his right to counsel. Wash. Rev. Code § 13.40.140(10) (2008); *Dutil v. State*, 606 P.2d 269, 272-75 (Wash. 1980).

With this guidance, on January 15, 2004,[5] Detective Jensen went to Stoot's school and interviewed Stoot in

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4. He also notified Child Protective Services. App. at 7a.

5. The Ninth Circuit opinion erroneously states that this occurred on January 15, 2003. App. at 7a.

the principal's office. App. at 7a-8a. As instructed by the county prosecutors, Detective Jensen gave Stoot a copy of the Everett Police Department Constitutional Rights waiver form and read Stoot his *Miranda* warnings. App. at 8a-9a. Stoot signed the waiver form, and Detective Jensen proceeded to question Stoot about A.B.'s allegations. App. at 9a. At no time did Stoot ask for his parents or an attorney or give any outward sign that he was confused. App. at 52a.

Stoot originally denied any improper contact with A.B. App. at 52a. Detective Jensen, relying on his professional training, used an accepted interviewing tactic of "blaming the victim" in his questioning. App. at 52a-53a. Eventually, Stoot admitted to improperly touching A.B. on three occasions. App. at 53a. After confessing, Stoot agreed to write out his confession. App. at 53a. While Stoot was writing out his confession, Detective Jensen observed Stoot's name listed on the "Honor Roll," indicating that Stoot was an honors student. App. at 51a. Once Stoot finished, Detective Jensen contacted Stoot's mother to notify her about Stoot's confession. App. at 53a.

Stoot claims that during the interrogation, Detective Jensen threatened him with three to five months of jail if he did not confess, but offered that the charges would be dropped and Stoot would only have to see a counselor if he confessed. App. at 10a-11a. Detective Jensen denies that he ever made any promises or threats about what might happen if Stoot did or did not confess. App. at 53a.

C. Washington State's Mandatory Reporting Law Required Detective Jensen to Include Stoot's Confession and Required the Police Department to Forward the Report and Confession to the Prosecutor

Washington State's mandatory reporting law requires that:

> Any law enforcement agency receiving a report of an incident of alleged abuse or neglect . . . involving a child . . . who has been subjected to alleged sexual abuse, shall report such incident in writing as provided in RCW 26.44.040 to the proper county prosecutor . . . whenever the law enforcement agency's investigation reveals that a crime may have been committed.

Wash. Rev. Code § 26.44.030(5) (2008). The report "must contain" any and all information that "may be helpful in establishing . . . the identity of the alleged perpetrator[.]" Wash. Rev. Code § 26.44.040 (2008).

As mandated by this law, Detective Jensen included all of his investigative information in his police report, including Stoot's confession. State law then mandated that the Police Department forward this police report to the county prosecutor. Wash. Rev. Code § 26.44.030(5) (2008).

Five and a half months later, the Snohomish County prosecutor relied on A.B.'s accusations and Stoot's confession to file charges against Stoot in juvenile court. App. at 12a.

Stoot was never taken into custody. App. at 12a.

D. The Juvenile Court Judge Suppressed Stoot's Confession After Finding that Stoot Did Not Understand His Rights but that "it would have appeared to Detective Jensen that [Stoot] understood his rights"

Five months after the charges were filed, Stoot exercised his right to challenge the voluntary nature of his confession at a suppression hearing, held pursuant to Washington Criminal Rule 3.5. App. at 12a.

After the charges were filed, but prior to the suppression hearing, Stoot underwent an extensive psychological evaluation. App. at 53a.

First, Stoot offered the testimony from Dr. Elizabeth Robinson, who met with Stoot on three separate occasions. App. at 57a; Andrews Decl., docket no. 54, Ex. 10(i)(1), page 10. With the benefit of a variety of tests and information not available to Detective Jensen, Dr. Robinson concluded that Stoot had an I.Q. of 81, with the intellect of a ten-year-old child. Andrews Decl., docket no. 54, Ex. 10(i)(1), pages 11, 13. She also determined that Stoot was very obedient and, unlike most children, would provide responses to questions even if he did not know the answer. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 14. Finally, she opined that Stoot did not understand his *Miranda* rights. Andrews Decl., docket no. 54, Ex. 10(i)(1) page 22.

Second, Stoot offered Dr. Mark Whitehill's testimony. App. at 57a. Based solely on his review of Dr. Robinson's evaluations, Dr. Whitehill testified that Stoot was "developmentally compromised" and susceptible to

demanding questioning and unable to understand his *Miranda* warnings. Andrews Decl., docket no. 54, Ex. 10(i)(2), page 68.

These evaluations, along with expert testimony, were introduced at the suppression hearing. App. at 13a. With the benefit of this detailed evidence, the Juvenile Court Judge found that, while it would have appeared to Detective Jensen that Stoot understood his rights, Stoot in fact lacked the capacity to understand or waive those rights:

> 18. At the time of the signing, it would have appeared to Detective Jensen that Defendant understood his rights; however, Defendant lacked the capacity to understand his rights and the Defendant could not make an intelligent or knowing waiver of his rights. The general rule is that a child over the age of 12 may be interviewed without presence of parents [sic] and may make a waiver of rights.

App. at 70a-71a.

Accordingly, the Juvenile Court Judge suppressed the confession. App. at 53a-54a. At a later hearing, a different juvenile court judge ruled that A.B. lacked the capacity to testify. App. at 54a. This led the county prosecutor to dismiss the charges against Stoot. App. at 14a.

E. In Stoot's Civil Damages Action, the District Court Dismissed All Claims on Summary Judgment

After the charges were dismissed, Stoot (along with his parents) filed a lawsuit against Detective Jensen and the City of Everett. The lawsuit alleged four § 1983 violations: (1) a Fourth Amendment violation for "seizing" Stoot in the principal's office for the interview; (2) a Fifth Amendment violation for obtaining the confession; (3) a Sixth Amendment violation for not providing counsel during the interview; and (4) a Fourteenth Amendment violation again for obtaining the confession. App. at 3a. The lawsuit also alleged the state tort of outrage for obtaining a false confession. App. at 3a. In addition, all of these claims were asserted against the City of Everett based on allegations that Detective Jensen's supposed illegal conduct was based on established City policy. App. at 3a.

On summary judgment, the District Court dismissed all of the claims. App. at 15a. The District Court dismissed the Fourteenth Amendment claim and the outrage claim after citing the Juvenile Court Judge's finding that "it would have appeared to Detective Jensen that [Stoot] understood his rights" and nothing Detective Jensen did would "shock the conscience" nor would it be considered "extreme and outrageous." App. at 70a-71a, 74a-75a. The Fourth Amendment claim was dismissed based on qualified immunity. App. at 68a-69a. The Sixth Amendment claim was dismissed because Stoot was never denied a lawyer. App. at 62a. The claims against the City of Everett were dismissed because Stoot failed to establish that the violation was caused

by a city custom or policy, and because child suspects do not have a constitutional right to be interrogated in any particular manner. App. at 72a-73a.

Finally, the District Court dismissed the Fifth Amendment claim because Stoot's statements were never used in a criminal trial. App. at 60a. In making this ruling, the District Court recognized that this exact issue, where presumably coerced statements were used in court proceedings but not a trial, was left open by the Court in *Chavez v. Martinez*.[6] App. at 58a. Nevertheless, the District Court found that "[t]he analysis of the plurality in *Chavez* strongly suggests that the Fifth Amendment privilege is a "trial right."[7] App. at 59a. The District Court stated:

> [At t]he CrR 3.5 hearing . . . the guilt of the defendant was ultimately not at issue. The Court finds "criminal case," as used in *Chavez*, means "criminal trial," a proceeding at which a defendant's guilt is determined. Accordingly, [Stoot] has failed to make out a cognizable § 1983 claim for violation of his Fifth

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6. *Chavez v. Martinez*, 538 U.S. 760 (2003).

7. The District Court also cited language from the Court's opinions in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs *only at trial*.") (emphasis added, citations omitted); and *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (describing the Fifth Amendment as a "trial right"). *See* App. at 59a.

> Amendment privilege against compelled self-incrimination, and Defendants are entitled to summary judgment on this claim.

App at. 60a-61a.

F. The Ninth Circuit Found Detective Jensen Should Have Known He Was Violating Stoot's Fifth Amendment Rights and that a Fifth Amendment Violation Occurs when an Involuntary Confession Is Used in Any Criminal Proceeding

On appeal, the Ninth Circuit affirmed the District Court as to all claims except the District Court's ruling on the Fifth Amendment. The Ninth Circuit started its Fifth Amendment analysis by recognizing that the Court's ruling in *Chavez* "poses but does not decide" the issue before the Ninth Circuit: whether a confession is used in a "criminal case" when it is used in support of filing charges, and at arraignment, but is ultimately suppressed at the suppression hearing and never used at trial. App. at 28a.

The Ninth Circuit next recognized that five circuits had addressed this issue "with mixed results." App. at 30a-31a. After analyzing the decisions from the three circuits that require use at an actual trial – the Third, Fourth, and Fifth Circuits – and from the two that have held use in any criminal proceeding is sufficient – the Second and Seventh – the Ninth Circuit sided with the minority and held that Stoot's confession had been used in a "criminal case," even though it was suppressed, it was never used at trial, and the charges against Stoot were dismissed. App. at 33a.

The Ninth Circuit then concluded that the county prosecutor's decision to use the confession was not an intervening cause that would break any causal link between Detective Jensen's actions and the use in the "criminal case." App. at 36a-37a. According to the Ninth Circuit, Detective Jensen should have known that by including details about Stoot's confession in his police report, it would likely lead to charges being filed. App. at 36a.

Finally, the Ninth Circuit addressed the issue of qualified immunity. It held that the legal uncertainty surrounding what qualifies as use in a "criminal case" did not entitle Detective Jensen to qualified immunity because the illegal conduct alleged by Stoot – improper promises and psychological coercion – and Detective Jensen's decision to include details of the confession in his police report were unrelated to this legal uncertainty. App. at 38a-39a. Detective Jensen was on notice, according to the Ninth Circuit, that his conduct was clearly impermissible, and therefore he was not immune from suit. App. at 38a. Accordingly, the Ninth Circuit remanded the case for trial on Stoot's Fifth Amendment claim.

REASONS FOR GRANTING THE PETITION

Two separate reasons warrant Supreme Court review of this case.

First, review is warranted to resolve a conflict between the Ninth Circuit's decision and rulings in other United States Courts of Appeal. The Ninth Circuit, joining the Second and Seventh Circuits, held

that a "criminal case" begins once charges are filed. The Third, Fourth, and Fifth Circuits all hold that "criminal case" means a criminal trial.

Second, review is warranted because this case involves an important unsettled question about the meaning of the Fifth Amendment that the Court left open in *Chavez* and should now resolve. If the Ninth Circuit's decision stands, it will create a level of uncertainty that will have a chilling effect on every custodial interrogation conducted by law enforcement officers in the Ninth Circuit.

A. The Court Should Grant the Petition Because the Decision Below Conflicts with Opinions from the Third, Fourth, and Fifth Circuits of the Court of Appeals

The Court should grant certiorari to resolve the conflict between the Courts of Appeal regarding the meaning of the phrase "criminal case" in the Fifth Amendment of the U.S. Constitution. The six circuits that have addressed this question in § 1983 or *Bivens*[8] actions have split three-to-three on whether a "criminal case" means a criminal trial or begins when charges are filed:

> Second Circuit: a "criminal case" begins once charges are filed. *Higazy v. Templeton*, 505 F.3d 161 (2d Cir. 2007) (summary judgment reversed and remanded for trial);

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8. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (providing a cause of action for violations of constitutional rights by federal actors).

Third Circuit: a "criminal case" means a criminal trial. *Renda v. King*, 347 F.3d 550 (3d Cir. 2003) (summary judgment affirmed);

Fourth Circuit: a "criminal case" means a criminal trial. *Burrell v. Virginia*, 395 F.3d 508 (4th Cir. 2005) (summary judgment affirmed);

Fifth Circuit: a "criminal case" means a criminal trial. *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005) (remanded for entry of summary judgment in favor of defendant because judge's decision to admit confession was superseding cause of violation);

Seventh Circuit: a "criminal case" begins once charges are filed. *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006) (summary judgment reversed); and

Ninth Circuit: a "criminal case" begins once charges are filed. *Stoot v. City of Everett*, 582 F.3d 910 (9th Cir. 2009) (summary judgment reversed).

There are at least five reasons why the Court should resolve this conflict.

First, there can be no doubt that an actual, acknowledged conflict exists between the circuits. The Ninth Circuit recognized that Stoot's "Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*" and the five other circuit courts that had addressed the question had reached "mixed results." App. at 29a-30a. The Ninth Circuit then briefly

addressed the three circuit decisions finding that "criminal case" meant criminal trial before analyzing the remaining two circuits that found that a criminal case began once charges were filed. App. at 30a-31a. It noted that the Seventh Circuit had rejected the analysis of the Third and Fourth Circuits. App. at 31a-32a. Finally, the Ninth Circuit also rejected the analysis of Third, Fourth, and Fifth Circuits in favor of the analysis by the Second and Seventh Circuits. App. at 33a. Thus, the conflict is obvious and has been expressly acknowledged.

Second, the conflict presents an issue that is extremely narrow, so there is no need to allow the issue to percolate in the lower courts to fill in the intricacies of the law with different fact patterns and detailed interpretations of different language. This case only requires the Court to determine the meaning of a two-word phrase: "criminal case." This phrase first became part of the law over 200 years ago when the Fifth Amendment was adopted. Three circuits have interpreted this phrase to mean a criminal trial. With the Ninth Circuit's ruling, three other circuits have determined that a criminal case begins once charges are filed. The Court should determine what this term has meant for 200 years.

Third, there is no reason to think this conflict will resolve itself. This does not involve a case where one circuit interpreted the law one way, and now there is a strong trend of the other circuits interpreting the law another way. Instead, the six circuits have split evenly on their interpretations and there is no reason to think that any will reconsider their rulings. Thus, absent a ruling from the Court, the conflict over the meaning of "criminal case" will remain unresolved.

Fourth, this case provides a clear opportunity for the Court to resolve the conflict. As the Ninth Circuit noted, Stoot's "Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*." App. at 29a. Because this case was resolved on summary judgment, there are no factual or procedural issues that would prevent the Court from resolving this conflict if the Court granted certiorari.

Fifth, the conflict between the circuits creates great inequities in different parts of the country that the Court should eliminate. As demonstrated in section B *infra*, the two different meanings will significantly affect a suspect's rights to bring a § 1983 action against an interrogating officer. Because of the conflicting rulings, law enforcement officers and suspects in different parts of the country have dramatically different exposure to federal civil rights claims. When federal courts interpret the Constitution in a manner that gives citizens different rights under the Constitution, based solely on where they happen to live, it is not only unfair, it also harms the integrity of the judicial system.

Law enforcement officers who work in Alaska, Arizona, California, Connecticut, Idaho, Illinois, Indiana, Hawaii, Montana, Nevada, New York, Vermont, Washington, and Wisconsin (the states that make up the Second, Seventh, and Ninth Circuits) must worry that every time they interrogate a suspect, there might be some unknown fact making the interrogation unconstitutional and thereby possibly subjecting the officer to a civil lawsuit that likely will not be dismissed on summary judgment. In contrast, law enforcement officers who work in Delaware, Louisiana, Maryland,

Mississippi, New Jersey, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia (the states that make up the Third, Fourth, and Fifth Circuits) can carry out their duties, including interrogations, with confidence, knowing that as long as they act in good faith, they do not have to worry about former suspects dragging them into court.

A similar dichotomy exists for suspects subject to illegal interrogations. Those who live in the states that make up the Third, Fourth, and Fifth Circuits and are formally charged based on illegal confessions have no right to seek civil redress. In contrast, suspects subject to illegal interrogations who live in states that make up the Second, Seventh, and Ninth Circuits and who are formally charged based on illegal confessions have the right to file § 1983 actions.

This inequity is bad for the U.S. legal system. With respect to § 1983 law suits, most law enforcement officer-defendants and suspect-plaintiffs will not understand the purpose of having 13 different federal circuits. Instead, they will see that persons in one part of the country have one set of Constitutional rights while persons in another part have a different set of Constitutional rights, all based on a single phrase in the Constitution that presumably has had an actual, singular meaning since 1791. The circuit courts' conflicting interpretations of the Fifth Amendment is thus the exact type of conflict Supreme Court Rule 10(a) is designed to address. Accordingly, the Court should grant certiorari and resolve this conflict.

B. The Court Should Grant the Petition Because the Ninth Circuit's Interpretation of "Criminal Case" Creates an Unnecessary and Extreme Chilling Effect on Law Enforcement Officers Conducting Interrogations

Supreme Court review of the Ninth Circuit decision is also warranted because this case involves the constitutional phrase "criminal case," the meaning of which has a direct effect on every custodial interrogation. Only the Court can settle this clear conflict.

The Ninth Circuit has interpreted "criminal case" to encompass the entire legal process, beginning with the filing of charges. This means that if a confession is used as part of a charging document, or at arraignment, or at the bail hearing, a suspect will be able to file a Fifth Amendment § 1983 claim, even if the statements are never used at trial.

If "criminal case" encompasses the entire legal process, then law enforcement officers preparing to conduct custodial interrogations will have to proceed knowing that unforeseen facts may emerge in a suppression hearing that could greatly increase their exposure to civil liability.

By contrast, the Third, Fourth, and Fifth Circuits have interpreted "criminal case" to mean a "criminal trial." This means that a suppression hearing will occur before any Fifth Amendment § 1983 claim would ripen.

If "criminal case" means the criminal trial, then law enforcement officers preparing to conduct custodial

interrogations will know that a full suppression hearing will occur before any Fifth Amendment violation can be triggered, giving the officers assurance that they will not be judged on facts that are unknown to the officers prior to suppression hearings.

The Supreme Court should accept review to settle the meaning of "criminal case" because the meaning adopted by the Ninth Circuit (as well as the Second and Seventh Circuits) creates an unworkable standard that will expose law enforcement officers to unnecessary lawsuits and liability. This exposure will have a chilling effect on officers preparing to conduct custodial interrogations.

The Ninth Circuit's recognition of a Fifth Amendment § 1983 claim for allegedly improper interrogations not used during a criminal trial is not justified because existing remedies are sufficient to deter improper conduct. ***First***, the plain language of the Fifth Amendment provides for suppression of involuntary confessions. ***Second***, the Court has already recognized in *Chavez* that a suspect can file a Fourteenth Amendment § 1983 claim when an interrogator uses extremely abusive interrogation techniques. *Chavez*, 538 U.S. at 779-80.

Not only is there no benefit to expanding Fifth Amendment rights by allowing § 1983 claims, the Ninth Circuit's interpretation of "criminal case" will discourage legitimate law enforcement activities. As Stoot's claim demonstrates, law enforcement officers will be subject to § 1983 claims based on information that may be

impossible for those officers to know, or unreasonable for the officer to acquire, at the time the officers take the actions that will create exposure to liability. Therefore, the only way an officer can assure that he will not face a § 1983 claim is to not conduct the interrogation.

The factual nature of Fifth Amendment claims exacerbates this chilling effect, increasing the likelihood that they will survive summary judgment. An officer in Detective Jensen's position preparing to conduct an interrogation will have to fear a § 1983 claim based on facts he knows, facts he should know, and facts he cannot know. He will also know that however frivolous that claim may be, it will still require the officer to endure discovery and a trial. Consequently, more officers will be sued and forced to endure the burdens of litigation.

By allowing a suspect to maintain a § 1983 claim based on the Fifth Amendment for an allegedly improper interrogation, the Ninth Circuit has created an unnecessary obstacle to legitimate law enforcement investigative activities without any substantive benefit. As Justice Souter warned in *Chavez*, allowing Fifth Amendment § 1983 actions for allegedly improper interrogations "would revolutionize Fifth and Fourteenth Amendment law." *Chavez*, 538 U.S. at 779 (Souter, J., concurring).

This problem does not exist if "criminal case" means "criminal trial" because the mandated suppression hearing will ensure that any involuntary confession is

not used at trial, preventing any violation from occurring in the first place.[9]

Thus, the Ninth Circuit decision places a sharper point on the direct conflict between the circuits on this fundamental point of Constitutional Law – this Court should settle when the use of an involuntary confession in a "criminal case" occurs that will trigger an actionable violation of the Fifth Amendment.

1. Allowing § 1983 Actions for Alleged Fifth Amendment Violations Is an Unnecessary Expansion of Fifth Amendment Rights

The Court has recognized that rules for the enforcement of constitution rights, including the Fourth and Fifth Amendment, are "primarily intended to regulate police in their day-to-day activities.". *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Roberson Dilemma*, 1974 Sup. Ct. Rev. 127, 142). To provide meaningful guidance, these rules must be "readily applicable by the police in the context of" police investigations. *Belton*, 453 U.S. at 458 (quoting LaFave, *supra*, at 142); *see also Davis v. United States*, 512 U.S. 452, 460-61 (1994) (mandating bright-line guidance for interrogations to avoid creating "obstacles to legitimate police investigations").

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9. If the court rules the confession is admissible, it will serve as an intervening cause that will relieve the officer of any liability unless the officer provides false testimony at the suppression hearing. *Murray*, 405 F.3d at 292-93.

While § 1983 actions may sometime serve as the best tool for regulating police activity by deterring constitutional violations, this is not the case in the context of improper interrogations. The text of the Fifth Amendment and case law governing interrogation practices already provide sufficient guidance for officers and the deterrence to prevent improper interrogations.

If an officer preparing to conduct a custodial interrogation is motivated by a desire to solve the crime and convict the suspect, the suppression hearing mandated by the plain language of the Fifth Amendment is sufficient to deter officers from coercing involuntary confessions. *See Chavez*, 538 U.S. at 777-78 (Souter, J., concurring) (detailing existing scope of Fifth Amendment protections). In this case, Stoot's confession was suppressed and therefore never used against him at trial.

If, on the other hand, an officer acts egregiously, or is conducting the interrogation for some purpose other than to solve a crime, a suspect will already have a § 1983 claim under the Fourteenth Amendment. *Chavez*, 538 U.S. at 779-80 (remanding for consideration of whether conduct violated the Fourteenth Amendment). In fact, in *Chavez*, the claimant's Fourteenth Amendment survived summary judgment on remand. *Martinez v. City of Oxnard*, 337 F.3d 1091 (2003). Therefore, the additional deterrence of allowing a § 1983 claim under the Fifth Amendment is not necessary to curb abusive police interrogation. Indeed, Stoot also made a Fourteenth Amendment claim against Detective Jensen.

Thus, the ruling by the Ninth Circuit creating an additional cause of action for money damages does not provide any significant deterrence to officers conducting improper interrogations. Moreover, as explained in the next section, the Ninth Circuit's ruling creates an unworkable standard by subjecting officers to potential liability for facts the officers cannot know when they engage in conduct that can create § 1983 liability. The only thing the Ninth Circuit's ruling will deter is law enforcement officers from vigorously carrying out their legal duties.

2. The Ninth Circuit Ruling Will Have a Chilling Effect on Legitimate Law Enforcement Activities

Law enforcement officers must make difficult discretionary decisions often in very short time frames. To ensure officers can make these decisions, "[a] single, familiar standard is essential." *Belton*, 453 U.S. at 458 (alteration in original) (citation omitted); *see, e.g.*, *Edwards v. Arizona*, 451 U.S. 477 (1981) (establishing bright-line rule on the waiver of counsel to avoid confusion). Bright-line rules have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogations." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (citation omitted). In contrast, when the rules are such that an officer in the field cannot apply them, it endangers everyone's rights and discourages officers from diligently carrying out their duties. *See Belton*, 453 U.S. at 458.

The concern over discouraging legitimate law enforcement conduct served as the basis for Justice Souter's concurrence in *Chavez*. Justice Souter wrote that there must be a "powerful showing" that allowing § 1983 liability was necessary to protect Fifth Amendment rights before the Court should provide for such claims based on an alleged Fifth Amendment violation. *Chavez*, 538 U.S. at 778 (Souter, J., concurring). Otherwise, Justice Souter was concerned that "whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to immunity," § 1983 suits will follow. *Chavez*, 538 U.S. at 778 (Souter, J., concurring).

In this case, Detective Jensen went out of his way to ensure he was up to date on the laws governing interrogations of minors. Under the Ninth Circuit's decision, this is not enough. Instead, the Ninth Circuit relied on facts and expert testimony developed almost a year after the interrogation at the suppression hearing to find that Detective Jensen had violated Stoot's Fifth Amendment rights.

While new facts will often come to light in suppression hearings, those facts will lead to the remedy provision of the Fifth Amendment – suppression of the confession. Adding an additional financial remedy imposes liability based on 20/20 hindsight by exposing law enforcement officers to potential liability based on facts they may have no way of knowing prior to the suppression hearing. This will have an extreme chilling effect on law enforcement activities because officers may curtail their legitimate conduct out of fear of being dragged into court.

a. Detective Jensen's liability effectively arose when he filed his police report

Under the Ninth Circuit's definition of "criminal case," it acknowledged that officers can be exposed to § 1983 liability once the officer decides "to file a police report detailing [the suspect's] alleged confession[.]" App. at 35a. Once the report is filed, it is the prosecutor, not the officer, who will decide whether to use the confession as a basis for filing charges. Nevertheless, the officer is liable for the prosecutor's decision, according to the Ninth Circuit, because it should be "reasonably foreseeable" to the officer that the prosecutor will use a confession included in the police report to file charges. App. at 36a.

The Ninth Circuit's opinion illustrates the injustice of assuming it is reasonably foreseeable that the report may be used even when it was not reasonably foreseeable to Detective Jensen that Stoot was incapable of waiving his Fifth Amendment rights. App. at 13a.

Finally, in some cases, including this one, the officer will be required by law to file the report. This is because in cases, like Stoot's, that involve child abuse, Washington State's mandatory reporting law, like similar laws in most states,[10] will require the officer to file his report and include all information that "may" help identify the perpetrator. Wash. Rev. Code §§ 26.44.040, .030 (2008). This meant that once Stoot had confessed,

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10. To qualify for federal funding to assist with care for neglected children, states are required to adopt mandatory reporting laws. See 42.U.S.C. 5101 *et seq.*

Detective Jensen was required to detail that confession, even if he had doubts about its voluntariness.

b. When he filed his police report, Detective Jensen reasonably believed Stoot's confession was voluntary

Detective Jensen took time to educate himself on the existing law regarding the interrogation of juvenile suspects, and he held a good faith belief that Stoot voluntarily waived his Fifth Amendment rights when he filed his report.

Prior to including any information about Stoot's confession in his police report, Detective Jensen:

- Consulted with two legal advisors to ensure he understood the current law for interrogating a minor;[11]
- Read Stoot his *Miranda* warnings and obtained a written waiver;[12]
- Had Stoot put his confession in writing;[13] and
- Learned that Stoot was an Honors Student.[14]

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11. App. at 7a-8a.
12. App. at 8a-9a.
13. App. at 53a.
14. App. at 51a.

Based on the record, the Juvenile Court Judge entered a finding that "it would have appeared to Detective Jensen that [Stoot] understood his rights[.]" App. at 70a-71a.

c. The Juvenile Court Judge relied on information Detective Jensen did not and could not know to support his ruling that Stoot's confession was not voluntary

The Juvenile Court Judge who determined Stoot's confession was involuntary had significant information that was not available until the suppression hearing. This was well after Detective Jensen took his last act that supports liability under the Ninth Circuit decision – the filing of his police report. This is also, by definition, after the legal act of filing charges, the action that the Ninth Circuit held marked the start of the "criminal case."

The additional information before the Juvenile Court Judge at the suppression hearing included:

- Expert testimony explaining that Stoot had an IQ of 81;[15]

- Expert testimony that Stoot had the intellect of a 10-year-old child;[16]

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15. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 13.

16. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 13.

- Expert testimony that unlike most children his age, Stoot was likely to provide answers to questions he did not know;[17]

- Expert testimony that Stoot was developmentally compromised and therefore more susceptible to demanding questioning;[18] and

- Expert testimony that Stoot could not and did not understand his *Miranda* rights.[19]

If Detective Jensen had all of this information when he prepared his police report, he likely would have described Stoot's confession differently.

Under the Ninth Circuit's decision, if a law enforcement officer in the Ninth Circuit vigorously carries out his duties while conducting an interrogation, he will be exposed to possible § 1983 liability based on the outcome of a suppression hearing conducted with the benefit of 20/20 hindsight and information the officer could not have known at the time of the interrogation. This type of uncertainty is exactly what Justice Souter warned about in his *Chavez* concurrence and what the Court has tried to avoid by limiting § 1983 liability through qualified immunity. Furthermore, as explained below, for claims like Stoot's, a court will not be able to resolve the issue of qualified immunity on summary judgment because it involve factual issues.

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17. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 14.

18. Andrews Decl., docket no. 54, Ex. 10(i)(2), page 68.

19. Andrews Decl., docket no. 54, Ex. 10(i)(1), page 22; Andrews Decl., docket no. 54, Ex. 10(i)(2), page 68.

3. Fifth Amendment § 1983 Claims Will Often Involve Fact Issues that Cannot Be Subject to Dismissal Based on Qualified Immunity.

The factual nature of Fifth Amendment claims aggravates the chilling effect of the Ninth Circuit's decision: even obviously frivolous § 1983 claims will survive summary judgment.

The Court has recognized that there is a strong "public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (citation omitted). To avoid interfering with this goal, the Court has developed the standards for qualified immunity to allow trial courts to dismiss most claims on summary judgment. *Harlow*, 457 U.S. at 807-08. Qualified immunity prevents § 1983 claims from having too great of a chilling effect on law enforcement officers charged with vigorously carrying out their official duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (carefully limiting liability under § 1983 claims so the "fear of personal monetary liability and harassing litigation will [not] unduly inhibit officials in the discharge of their duties").

The Ninth Circuit opinion undercuts this goal by allowing for § 1983 claims based on the Fifth Amendment that will turn on questions of fact that courts will not be able to dismiss on summary judgment. When there has been a constitutional violation, a court can only dismiss a § 1983 claim on summary judgment based on qualified immunity if the law regarding that violation is not well established. *Anderson*, 483 U.S. at 638-39.

It is well established, however, that it is unconstitutional for officers to use psychological coercion such as improper threats or promises to obtain a confession. *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (confession coerced with improper promises or threats was inadmissible); *Weaver v. Brenner*, 40 F.3d 527, 533-34 (2d Cir. 1994) (holding that it was "clearly established in 1989 that police could not lawfully coerce statements" using psychological coercion). When a plaintiff like Stoot alleges he was coerced into confessing by threats or improper promises, it will almost always create a "he-said-she-said" fact issue about whether any such threats or promises were actually made. Because the fact issue turns on the issue of credibility, the claim cannot be resolved on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[c]credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment"). While a cautious officer can seek additional protection by having a third party present or recording the interrogation, these steps will only affect the weight of the officer's testimony and will not eliminate a fact question.[20] *Scott v. Harris*, 550 U.S. 372, 380 (2007) (providing that "facts must be viewed in

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20. Although the Court held in *Scott* summary judgment could be granted based on a videotape, in the case of a confession, the suspect could simply claim that the recorder does not depict everything that happened because it was turned off when the improper threats or promises were made. *See Scott*, 550 at 378 (relying on videotape to hold summary judgment was proper when plaintiff did not make "any contention that what [the videotape] depicts differs from what actually happened").

the light most favorable to the nonmoving party" unless "blatantly contradicted by the record"). Taking these extra steps would also slow down investigations where time is otherwise of the essence and would add an extra burden to law enforcement. This would be especially pronounced with regards to smaller police forces with fewer resources available to them in the first place.

Therefore, if the Ninth Circuit decision is not reversed, a law enforcement officer like Detective Jensen who is preparing to interrogate a suspect will know that if the suspect confesses and then recants, the suspect will be able to file a § 1983 action and survive summary judgment simply by alleging the officer made threats or improper promises. An officer's concern over such a claim will have a chilling effect because there is very little an officer can do, short of not conducting the interrogation, to insulate himself from a § 1983 claim, discovery, and trial.

4. The Ninth Circuit Opinion Does Not Provide a Meaningful Limiting Principle for § 1983 Claims

The Ninth Circuit's ruling includes no true limiting principle and will affect all law enforcement officers preparing to conduct custodial interrogations.

In *Chavez*, Justice Souter noted that allowing Fifth Amendment § 1983 claims would create extensive liability that would not be subject to any reasonably limiting principle. *Chavez*, 538 U.S. at 778-79 (Souter, J., concurring). The Ninth Circuit held that linking liability to the filing of charges provided that limiting principle. App. at 34a n.15.

Contrary to the Ninth Circuit's claim, linking liability to the filing of charges does not provide a true limiting principle because the charging decision is not made by the interrogating officer. In fact, the Ninth Circuit held that Detective Jensen was liable because he "had no reason to believe that the statements would not be used against" Stoot, making such use a "reasonably foreseeable consequence[]" of Detective Jensen's actions. App. at 36a, 38a-39a. Because the Ninth Circuit held that an interrogating officer is on notice that every allegedly improper interrogation "*could* ripen into a Fifth Amendment violation," then the filing of charges is not a true limiting factor on the harmful chilling effect that concern over potential § 1983 liability causes. App. at 38a. It was precisely this chilling effect that Justice Souter was concerned about when he emphasized the need for a limiting principle in his *Chavez* concurrence. *See Chavez*, 538 U.S. at 778-79 (Souter, J., concurring).

5. The Meaning of "Criminal Case" Is an Important Question of Federal Law that the Court Should Settle

In conclusion, the Court should grant this petition for a writ of certiorari because it involves the unsettled question about what "criminal case" means and because the Ninth Circuit's interpretation of that phrase creates an unnecessarily chilling effect on legitimate law enforcement activities.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED SEPTEMBER 18, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-35425

PAUL A. STOOT, SR.; TAMMIE L. STOOT, husband and wife, and as parents and guardians of PAUL A. STOOT II; and PAUL A. STOOT II, a minor child,

Plaintiffs-Appellants,

v.

CITY OF EVERETT, a municipal corporation; OFFICER JON A. JENSEN; JANE DOE JENSEN, and the marital community thereof,

Defendants-Appellees.

D.C. No. CV-05-01983-TSZ

AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, Senior District Judge, Presiding

Appendix A

Argued and Submitted
October 23, 2008—Seattle, Washington

Filed August 13, 2009
Amended September 18, 2009

Before: Barry G. Silverman and Marsha S. Berzon, Circuit Judges, and James C. Mahan,* District Judge.

Opinion by Judge Berzon

OPINION

BERZON, Circuit Judge:

Based solely on statements by a four-year-old that she had been sexually abused when she was three, Everett Police Detective Jon Jensen seized and interrogated plaintiff Paul Stoot II for almost two hours in the principal's office at Paul's school. Near the end of the interrogation, Paul stated that he had molested the victim three times. The confession was then used to file criminal charges against Paul in juvenile court.

A state court subsequently dismissed the charges, holding that the confession had been coerced and that the four-year-old victim was incompetent to testify at trial. After the charges against Paul were dismissed, the Stoot family filed this action under 42 U.S.C. § 1983,

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

asserting violation of Paul's rights under the Fourth, Fifth, and Fourteenth Amendments. Specifically, the Stoots alleged that (1) Jensen seized Paul without probable cause in violation of the Fourth Amendment, as the victim's statements, standing alone, were unreliable; (2) Jensen coerced a confession that was later used against Paul in a criminal proceeding, in violation of the Fifth Amendment; and (3) Jensen's interrogation techniques were so coercive as to violate substantive due process under the Fourteenth Amendment. The Stoots also asserted a claim of municipal liability against the City of Everett based on its policies and practices regarding interrogation of juvenile suspects and child victims, as well as a state law claim of outrage.

We conclude that the Stoots have alleged viable claims under both the Fourth and Fifth Amendments, as Jensen seized Paul without probable cause and then allegedly coerced incriminating statements that were later used against Paul in a criminal proceeding. We nonetheless affirm the district court's grant of summary judgment to defendants on the Fourth Amendment claim on the basis of qualified immunity, as the pertinent law was not clearly established at the time of the violations. The Fifth Amendment claim, however, may proceed in district court, as the aspects of the pertinent law not clearly established at the time of the confession did not affect Jensen's role in bringing about the violation. Finally, we affirm the district court's grant of summary judgment to defendants on the Stoots' remaining claims, as Jensen's conduct did not rise to the level of a substantive due process violation or a state

law claim for outrage and the Stoots have failed to provide evidence supporting municipal liability.

Facts & Procedural History

On December 23, 2003, Nicki Johnson contacted the City of Everett Police Department to report that her four-year-old daughter, A.B., had been sexually abused by an acquaintance, Paul Stoot II ("Paul"). Officer Margaret Anders responded to the call and briefly interviewed Nicki. Nicki stated that four days earlier, she had walked into A.B.'s bedroom and found her with "her pants down . . . touching herself." Nicki asked A.B. why she was doing that, and A.B. eventually responded "because Paul touched me there." Nicki then asked her to explain exactly what happened, and A.B. replied that "[Paul] pulled down his pants and pulled his little thing out and pulled her pants down and put it on her." According to Nicki, A.B. indicated that this had happened five times between June and September 2002, while A.B. was living with the Stoot family.

Nicki told Officer Anders that "Paul" referred to Paul Stoot II, the 14-year-old son of Paul Stoot, a local pastor ("Pastor Paul"). Nicki described the neighborhood in which the Stoot family resided, and Officer Anders verified this information by finding an address for Paul Stoot in a local directory. She then instructed Nicki not to question her daughter any further about the incident, wrote her report, and passed it along to City detectives. Anders noted that "[t]hroughout my interaction with her, [Nicki] appeared

to be a credible person who was not exaggerating or fabricating allegations. I had no reason to doubt her or the version of events that she conveyed to me." Anders's report concluded her involvement in the case.

Anders's report was assigned to Detective Jonathan Jensen the next day. At the time of the investigation, Jensen had been a police officer for twenty-four years, including five years in the Special Assault Unit, which focuses on cases of child sexual abuse. Jensen began his investigation by contacting Nicki, who described the same conversation with her daughter previously relayed to Anders. Based on his "background and training," Jensen "believed that [Nicki] had done [a] reliable job of obtaining truthful and accurate information from her daughter without leading her or planting a suggested story." Nicki agreed to allow Jensen to interview her daughter.

Jensen interviewed A.B. outside the presence of her mother or anyone else. He did not videotape or audio-record the interview. He did take notes, but threw them out shortly after preparing his police report. The account of the interview in his report thus constitutes the only contemporaneous description in the record of Jensen's interview with A.B.

According to the report, Jensen began the interview by "telling [A.B.] some things about [himself] in a rapport building exercise." He then asked her, "Has anyone ever touched you in a way you don't like?" A.B. answered, "No." Jensen then began working with sketches of a

little boy and a little girl, asking A.B. to identify various body parts. After pointing to the little boy's penis, Jensen asked if she knew what that was called, to which A.B. responded that she didn't remember, but that girls weren't supposed to touch it. Jensen then asked, "Have you ever seen another boy's penis before?" A.B. responded, "A boy named Paul. He has one of these. He put it on my privates, on the bed he did, at [the Stoot's house]." A.B. said this happened on five days.

Jensen proceeded to ask a number of questions about Paul. A.B. stated that "[Paul] told me to taste[his penis]" one time in the bathroom, but that she "didn't touch it." She said that they went into the bedroom, and "he put his poo poo on me." Jensen asked A.B. if Paul touched her anywhere else, to which A.B. responded that "he sits on me and bounces when he puts his poo poo on me." She said that she "wouldn't like it. Sometimes, I like it but I don't like it. Sometimes, it gets stuck."

A.B.'s answers were at times confused or contradictory. Jensen asked her, for example, "Did Paul's penis touch your face?" to which A.B. answered, "No." Jensen then asked her, "Did you touch his poo poo?" A.B. denied that she did, but then began talking about another boy, "Preston." She answered, "No. I told you I didn't. He usually puts his poo poo inside here (she pointed to her vaginal area). Preston puts his poo poo in my pee pee." Jensen asked her who Preston was, and A.B. responded that he was a six-year-old friend who lives far away. Jensen then "told her [he] wanted to

talk more about Paul and not talk about Preston anymore."

Jensen also asked A.B. several times whether Paul licked her. The first time, A.B. responded, "No. He just put his poo poo in my pee pee." A moment later, however, Jensen asked her if there was anything she forgot to tell him, to which she answered, "He actually has licked me." A.B. also stated, "Actually, I did lick his poo poo," although she had previously denied doing so several times.

Following the interview, Jensen talked to Nicki, who told him that A.B. had stayed with Paul Stoot and his family from June 2002 to September 2002 while Nicki dealt with some financial problems.[1] Jensen then called the local school district to find out which school Paul attended. Because he now considered Paul "a suspect in a rape of child case," Jensen also notified Child Protective Services of his investigation.

On January 15, 2003, Jensen called Bree Nelson, Principal of Voyager Middle School, to arrange an on-campus interview with Paul. Before interviewing Paul, Jensen spoke with two Snohomish County prosecutors

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1. Jensen did not take any steps to verify that A.B. had, in fact, lived with the Stoots during this time period. If Jensen had contacted Pastor Paul to confirm Nicki's account of their relationship, he likely would have learned that the Stoots discontinued A.B.'s enrollment in the family's daycare service two months before Nicki made her allegations, because Nicki owed them roughly $3,000.

"to make sure[he] was current on the legal standards for interviewing juvenile suspects that were at least 12 years old." According to Jensen,

> From these discussions, [he] picked up two points of information; (1) if the juvenile requests his parents during the interview, treat the request the same as one for legal counsel, and (2) give the juvenile *Miranda* warnings and have him sign the waiver form (if applicable) even for non-custodial interviews since the interview was to take place at a school where the child was not free to leave.

Acting on this advice, Jensen told Nelson that she did not need to contact Paul's parents before the interview. Rather, Jensen indicated that he would contact them afterwards.

When Jensen arrived at the school, Vice Principal Bailey pulled Paul out of class and took him to the principal's office, where Jensen was waiting for him. At this point, the parties' version of events begins to differ.[2] According to Jensen,

> I introduced myself and said I wanted to talk to [Paul]. He said okay. I sat down with him at a small table, and produced a rights form. I explained I was required to read him his

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2. As with his interview of A.B., Jensen did not record or preserve notes from his interview with Paul.

> rights before I could talk to him. He shook his head up and down. I read his rights . . . , and he signed the form to indicate that he understood, and signed that he was willing to talk to me.

After Paul waived his rights, Jensen states that he questioned Paul about A.B.'s allegations for close to two hours and that—after denying any wrongdoing at least 13 times—Paul eventually confessed. In Jensen's words, he successfully employed "the interviewing technique of blaming the victim":

> I kept talking to him about A.B. starting the contacts, and about her being sexually aggressive. I kept telling him that it would have been normal for him to respond to her touching him. . . . I kept talking to him, and I finally said, 'You touched her vagina with your fingers, didn't you.' He said, 'Yes.' I asked, 'How many times?' He said, 'Three times on her vagina.'

According to Jensen, Paul also voluntarily agreed to provide a written statement. In that statement, Paul admitted that "[o]ne time I did touch her on her vagina for like 5 seconds," although he maintained that "[n]either of us pulled down our pants and rubbed on each other," that "she never put her mouth on my penis and I never put my mouth on her vagina," and that "[s]he never seen my penis, only when she walked in the bathroom and grabbed it but I didn't let her." In a note

at the bottom of the statement, added at Jensen's instruction,[3] Paul indicated that he "rubbed on vagina 2 times with clothes on then one time for a couple of second with clothes off."

The Stoots provide a very different account of Paul's interview with Jensen. According to the Stoots, after Paul's repeated denials, Jensen "adjusted his tactics, and coerced admissions from Paul." They assert that this coercion "included the making of impermissible threats of heightened punishment if Paul denied guilt, and impermissible promises of leniency if he admitted guilt." Paul claims, for example, that after almost two hours of interrogation,

> I'm thinking, man, he's not taking no for an answer and I don't know what to do. I don't know what to say besides tell him, yes, I did it. And I thought that I wasn't going to be able to walk out that room if I kept telling him no.

At that point, Paul alleges that Jensen told him,

> "[I]f I say no—if I keep saying no and denying it, then this could lead to court and you could

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3. In his declaration, Jensen claims that "[Paul] wrote out the text of the statement without any direction from me." Jensen's police report contradicts his declaration. In the report, Jensen states, "I reviewed [Paul's written statement]. I found where he said he touched A.B. one time on her vagina. It had been my recollection he said he touched her three times on her bare skin. . . . I asked him to clarify this by adding a sentence to the end of his statement."

> go to jail for three to five months.... And if I just said that, yes, that all of this will be over, this won't lead to court. No charges will be pressed and you won't be going to jail and that I will only have to see a counselor."[4]

After these false promises, the Stoots contend, "Paul's will was overcome by these tactics and the physically imposing Detective Jensen," and Paul falsely confessed. In Paul's words,

> I had never been so scared in my life as when he said he didn't believe me when I told the truth. I wanted my mom or dad or a teacher there, but I thought I just had to sit there and do what he said. He just kept drilling me saying he did not believe me again and again. . . . I felt I had to lie and tell him what he wanted to get out of that room.

The Stoots assert that Jensen's interviewing tactics also violated Miranda, as Paul lacked the capacity to consent to the interrogation. They allege that although Jensen "verbally read [Paul] his 'Miranda' rights, and instructed[Paul] to sign the waiver form provided," later psychological and developmental testing confirmed that Paul "lacked the capacity to understand or assert his legal rights." Paul thought that the right to remain silent, for example, meant that he "couldn't say anything.

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4. Jensen specifically denies this accusation, contending that he "never made any promises to Paul II about what might happen to him."

I had to be quiet and I just had to listen to the cop." The right to an attorney, in his mind, meant that "after we had the interview. I could appoint an attorney. And if I couldn't, then the State will give me one." According to the Stoots, Paul's failure to understand his *Miranda* rights should have been apparent to Jensen at the time of the interview.

After the interview, Jensen sent Paul back to class. On July 2, 2004, Snohomish County prosecutor Janice Ellis filed an Information charging Paul with child molestation in the first degree. An Affidavit of Probable Cause, filed with the Information, relied solely on (1) Nicki's statements to police; (2) Jensen's interview of A.B.; and (3) Paul's confession. At an arraignment hearing a few weeks later, the Superior Court found that "probable cause exists for the charge" and released Paul on his own recognizance on various conditions, including that he "always be supervised by an adult who is aware of the charge."

On November 3, 2004, the Superior Court held a hearing pursuant to Washington Criminal Rule 3.5 (the "CrR 3.5 hearing") to determine the admissibility of Paul's confession.[5] After hearing testimony from Paul,

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5. Criminal Rule 3.5 provides, *inter alia*, that "[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing . . . for the purpose of determining whether the statement is admissible. . . . It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at

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Jensen, and expert witnesses, the court concluded that Paul "lacked the capacity to understand his rights and . . . could not make an intelligent or knowing waiver of his rights." The court found that because Paul did not ask for clarification of the meaning of his rights and did not display any apparent confusion at the time of the *Miranda* warnings, "it would have appeared to Detective Jensen that [Paul] understood his rights." Based on the totality of the circumstances, however, including Paul's age, experience, background, and intelligence, the court concluded that any waiver of his rights was invalid.

The Superior Court also addressed the allegedly coercive nature of Jensen's interrogation techniques, finding that "it is not per se coercive to use what has been described . . . as Reid techniques [*i.e.*, blaming the victim] for interrogation." The court noted, however, that Paul also claimed that Jensen "made certain promises of leniency if he confessed and implied more serious consequences if he refused to confess." Although Jensen denied making these threats or promises, the

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the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial." Wash.Super. Ct.Crim. R. 3.5(a), (b).

court found Paul's testimony on this point persuasive, as Paul "lacked the experience and knowledge to fabricate the nature of the promises made" and "was not sophisticated enough to create a scenario of promised counseling in lieu of other punishment." The court therefore concluded that the statements made by Paul in his interview with Jensen "were the product of impermissible coercion," and were therefore inadmissible.

The Superior Court also heard testimony regarding A.B.'s competence as a witness. The court learned that A.B. had a history of hallucinations and panic attacks, that she had been prescribed medication for anxiety neurosis, and that doctors had previously referred her to a child mental health specialist. Based on these concerns as well as A.B.'s testimony, the court found that A.B. "lacked the mental capacity at the time of the occurrence . . . to receive accurate impressions" and "lacked memory sufficient to retain independent recollection of any occurrences supporting the charged offense." The court thus concluded that A.B. was not competent to testify at Paul's trial, and excluded all "alleged hearsay statements made on or about December 19, 2003[the date of A.B.'s statements to Nicki], and January 8, 2004 [the date of Jensen's interview]." The court also granted Paul's motion to dismiss the charges against him with prejudice, holding that "as a matter of law the undisputed material facts fail to establish a *prima facie* case of guilt."

After the charges against Paul were dismissed, the Stoot family brought this action against Jensen and the City of Everett.[6] As noted, the Stoots alleged various federal constitutional claims under § 1983, as well as a claim against the City for municipal liability and a state law claim for intentional infliction of emotional distress.[7] The district court granted defendants' motion for summary judgment on all claims. Specifically, the district court held that (1) Jensen was entitled to qualified immunity on the Stoots' Fourth Amendment claims because "[a] reasonable officer in[his] position could have believed that the statements by the victim established probable cause, notwithstanding the significant amount of time between the accusations by A.B. and the alleged molestation, and A.B.'s young age"; (2) the Stoots "failed to make out a cognizable § 1983 claim for violation of [Paul's] Fifth Amendment privilege against compelled self-incrimination" because Paul's statements were never used against him in a criminal trial; (3) Jensen's interrogation of Paul was not so "unduly coercive or improper" as to violate Paul's right to substantive due process under the Fourteenth Amendment; (4) the Stoots "failed to identify facts in support of their claim that a government custom or policy resulted in a violation of Paul II's constitutional

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6. The Stoots filed this action in Washington Superior Court on November 22, 2005. Defendants subsequently removed it to federal court.

7. The Stoots also initially claimed a violation of Paul's Sixth Amendment right to counsel, but did not oppose summary judgment on that claim and do not raise it on appeal.

rights," foreclosing any claim for municipal liability; and (5) the Stoots' claims for outrage or intentional infliction of emotional distress failed as a matter of law because Jensen's actions were not "outrageous in character" or "extreme in degree."

The Stoots timely appealed.

Analysis

We review the district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to the non-moving party. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir.2007). Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

I. Fourth Amendment Seizure

"By virtue of its 'incorporation' into the Fourteenth Amendment, the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty." *Baker v. McCollan*, 443 U.S. 137, 142, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). In this case, defendants concede that on plaintiff's version of the facts, which we must credit for purposes of summary judgment, Jensen's detention and interrogation of Paul constituted a seizure, and we agree. *See Doe v. Heck*,

327 F.3d 492, 509-10 & n. 15 (7th Cir.2003). We must therefore decide whether Jensen had probable cause to seize Paul and, if not, whether Jensen is entitled to qualified immunity because the law was not clearly established at the time of the interrogation.[8]

A. Probable Cause

"Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information

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8. Before the Supreme Court's recent decision in *Pearson v. Callahan*, __ U.S. __, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009), courts addressing an official's claim of qualified immunity were required to follow the two-step sequential inquiry established in *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), asking first whether the plaintiff alleged a violation of a constitutional right and, second, whether that right was clearly established at the time of the conduct at issue. *Pearson* relieved courts of their obligation always to follow this sequence, permitting "[t]he judges of the district courts and the courts of appeals . . . to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S.Ct. at 818.

Although rigid adherence to the *Saucier* protocol is no longer required, the Court was careful to note that *Saucier*'s two-step procedure is "often beneficial," as it "promotes the development of constitutional precedent." *Id.; see also id.* at 821-22. Such is the case here, where we have not previously addressed whether a police officer may rely *solely* on the statements of a very young victim of alleged sexual abuse to establish probable cause to seize a potential suspect.

[are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (internal quotation marks omitted); *see also Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Further, "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable [people], acting on facts leading sensibly to their conclusions of probability." *Brinegar*, 338 U.S. at 176, 69 S.Ct. 1302.

The Stoots argue that Jensen violated Paul's Fourth Amendment rights by relying solely on "the confused statement from a 4-year-old girl made during an improperly conducted interview" to justify Paul's seizure. They note that A.B. provided "vastly different reports about what was alleged to have happened, when, where, and with whom"—inconsistencies that should have raised "serious concerns about the veracity and reliability of the allegation made by A.B." And they maintain that a reasonable officer, presented with A.B.'s contradictory account of alleged abuse, should have engaged in a more thorough investigation to corroborate A.B.'s allegations before seizing and interrogating Paul. Had Jensen done so, the Stoots contend, he quickly would have learned that A.B. was "a confused young girl, with a long history of

hallucinations, vaginal issues, and reports of sexual abuse by other persons," whose statements, standing alone, were not sufficiently reliable to constitute probable cause.[9]

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9. The Stoots present two other arguments in support of their Fourth Amendment claim, neither of which has merit. First, they argue that defendants conceded in the proceedings below that Jensen lacked probable cause. This argument is based on the district court's characterization of an exchange with counsel at oral argument, in which defense counsel admitted that "reasonable minds could differ as to whether Detective Jensen had probable cause to arrest Paul II before the questioning at the school." An admission that reasonable minds could differ, however, is not a concession that the opposing party is correct. Moreover, defendants clearly do not concede that Jensen lacked probable cause on appeal, as they address the issue at some length in their brief.

Second, the Stoots challenge Jensen's interviewing techniques, arguing that his interview with A.B. was riddled with "leading and/or coercive questions" that undermined the reliability of her answers. This argument is foreclosed by our decision in *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir.2001) (en banc), in which we rejected a foster parent's claim that governmental officials acted unconstitutionally by "fail[ing] . . . to conduct and monitor these interrogations [of a child] in a manner that would ensure the veracity of the information obtained." *Id.* at 1076 (quotation omitted). *See also Cunningham v. City of Wenatchee*, 345 F.3d 802, 812 (9th Cir.2003) (relying on *Devereaux*, rejecting a claimed constitutional violation premised on "mere allegations that [an official] used improper interview techniques" when interviewing a child, including continuing the questioning after an initial denial of abuse.). Thus, even if Jensen employed improper techniques in his interview with A.B., that would not give rise to a separate constitutional claim. Rather, the question before us remains whether the information available to Jensen at the time of the seizure was sufficiently reliable to constitute probable cause.

We agree with the Stoots that A.B.'s statements were not sufficiently reliable to establish probable cause to seize Paul. Law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects. But such information does not, on its own, support a finding of probable cause if the information is not reasonably trustworthy or reliable. *See Cortez v. McCauley*, 478 F.3d 1108, 1116-22 (10th Cir.2007) (en banc); *United States v. Shaw*, 464 F.3d 615, 623-26 (6th Cir.2006); *Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir.1987). In this case, three factors, taken together, compel the conclusion that the statements made by A.B. to Jensen were not sufficiently trustworthy or reliable to establish probable cause on their own.

First, A.B. was four years old at the time of the interview, and she was reporting events that purportedly occurred when she was three. Common experience counsels extreme caution in crediting detailed recollections of events said to have occurred at such an extremely young age, particularly those reported over a year later by a child still very young. *See Shaw*, 464 F.3d at 624.

Second, A.B. changed her answers at several points during the interview. She began by stating that no one had touched her in a way she didn't like, but proceeded to make several allegations—in response to specific questions from Jensen—that Paul had touched her in ways she "wouldn't" or "didn't" like. She also initially denied that Paul had licked her or that she had licked him, but then reversed herself on both counts by the

end of the interview, claiming both that "[Paul] actually has licked me" and that "[she] did lick his poo poo."

Third, A.B. at one point confused Paul with another boy. In response to a question about Paul, A.B. stated that "Preston puts his poo poo in my pee pee." She did so right after denying that Paul's penis had touched her face, or that she had touched Paul's penis.

These three circumstances, considered together, point to the need for further investigation and corroboration to establish probable cause. In cases involving very young child victims, the courts have repeatedly emphasized the need for some evidence in addition to the statements of the victim to corroborate the allegations and establish probable cause. *See Shaw*, 464 F.3d at 624 (discussing this line of cases and noting that, in each case, "the court specifically noted that a child's testimony was not the only evidence supporting probable cause"). The need for further investigation was particularly acute in this case, in which a four-year-old victim struggled to provide a coherent description of abuse that allegedly occurred eighteen months earlier, when she was three years old. *Cf. id.* ("We are not aware . . . of any situation in which the uncorroborated hearsay statement of a child as young as three, standing alone, has been considered sufficient to establish probable cause.").

Defendants maintain that the statements of child victims—even if internally conflicting—can establish probable cause to arrest a suspect. For support, they

rely primarily on the Tenth Circuit's decision in *Easton v. City of Boulder*, 776 F.2d 1441 (10th Cir.1985).

In *Easton*, the parents of a three-year-old boy reported that he had been molested the previous day. *Id.* at 1443. After interviewing the alleged victim among others, the police secured a warrant for Easton's arrest. *Id.* at 1446. The district attorney subsequently decided not to press formal charges. *Id.* Easton then brought suit under § 1983, challenging the reliability of the child testimony used by the police. *Id.* at 1449.

The Tenth Circuit rejected Easton's claim that the police unreasonably relied on the statements of the child victim, noting that "[i]n a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of children" and that "[t]o discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution." *Id.* The court therefore flatly repudiated a *per se* rule that the testimony of very young child victims may not be relied upon at all in a probable cause determination. *Id.*

The court also rejected Easton's claim that "apparent inconsistencies" in the child testimony rendered the police officers' reliance on those statements unreasonable. Although it described this argument as "the one point which does lend some merit to [Easton's] case," the court began by explaining that "when examining informant evidence used to support a

claim of probable cause . . . the skepticism and careful scrutiny usually found in cases involving informants . . . is appropriately relaxed if the informant is an identified victim or ordinary citizen witness." *Id.* The court noted that while certain statements of the child victim were undeniably self-contradictory, those inconsistencies "[did] nothing to undermine the solid core of the children's statements regarding [one instance of assault] and the location of the perpetrator's apartment." *Id.* at 1450. The court therefore held that the police had probable cause to arrest Easton once they had completed their interviews.

Easton simply cannot bear the weight placed upon it by defendants in this case. Although defendants cite *Easton* for the general proposition that police may reasonably rely solely on the partially-conflicting statements of child victims, the investigating officers in that case did no such thing. To the contrary, the police interviewed *both* the victim and his five-year-old playmate, who had allegedly witnessed one of the two incidents of molestation. 776 F.2d at 1443. The Tenth Circuit emphasized that the officer's "separate interview of [the victim's playmate] also corroborated all the facts given by [the victim] and by his father." *Id.* The court also stressed that the two children "together led [the officer] to the laundry room where the second assault took place," and that the officer there observed the blanket and black vinyl chair that both boys had mentioned in their statements. *Id.* at 1443-44. The officer also interviewed the apartment manager, learning that Easton was a loner with few friends who "had been

observed in the past staring at the children playing in the common area of the apartment complex." *Id.* at 1444 (internal quotation marks omitted).

The police in *Easton* therefore had substantial evidence corroborating the victim's statements of alleged abuse, rendering the officers' reliance on those statements reasonable. *Id.* at 1449-50. In this case, by contrast, defendants submit that A.B.'s statements standing alone, without *any* corroborating evidence, provided probable cause to arrest Paul. *Easton* provides no support for that proposition.[10]

We hold that Jensen could not rely solely on the uncorroborated, inconsistent statements of this very young child to establish probable cause to arrest Paul. Given A.B.'s age at the time of the purported events and at the time she reported them, as well as the inconsistencies noted above, A.B.'s statements, standing alone, were insufficient to establish probable cause to seize Paul.[11]

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10. Indeed, the Tenth Circuit has cited its opinion in *Easton* for precisely the opposite principle, describing Easton as a case involving statements by child victims that were "independently corroborated by police investigation." *Cortez*, 478 F.3d at 1119.

11. Requiring officers to conduct some further investigation to corroborate the allegations of a young child victim would not impose any substantial burden on law enforcement. In this case, for example, there were several, easy approaches Jensen could have used to attempt to corroborate

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B. Qualified Immunity

Even if Jensen did violate Paul's Fourth Amendment rights by seizing him without probable cause, Jensen may still be entitled to qualified immunity if his conduct " '[did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan*, __ U.S. __ __, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Defendants argue, and the district court held, that Jensen is entitled to qualified immunity because "[a] reasonable officer in Detective Jensen's position could have believed that the statements by the victim established probable cause." Defendants argue, in other words, that although Jensen was mistaken in his belief that A.B.'s statements established probable cause, the mistake was a reasonable one.

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A.B.'s statements, approaches which also would have allowed him to learn that A.B. and her mother were less than credible. Jensen could have verified that A.B. had lived with the Stoots and why she was living there; determined whether A.B. could successfully identify Paul; and sought medical information to assess whether A.B.'s 18-month-old allegations were supported by any physical evidence. As it turned out, any such effort to corroborate A.B.'s statements likely would have cast serious doubt on her allegations, as her mother was engaged in an ongoing financial dispute with the Stoots at the time of her allegations, and A.B. had a history of mental health problems.

The doctrine of qualified immunity "operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (internal quotation marks omitted). In this case, the Stoots have not cited a single case squarely holding that an officer cannot rely solely on the statements of a child sexual assault victim obtained during a personal interview to establish probable cause, nor are we aware of one. To the contrary, although two circuit courts of appeals have held that uncorroborated hearsay statements of a child victim are insufficient to establish probable cause, both of those opinions *could* be read to imply—although we do not so read them—that the officers lacked probable cause primarily because they had not personally interviewed the victim and therefore had no basis upon which to assess credibility. *See Cortez*, 478 F.3d at 1119; *Shaw*, 464 F.3d at 624.

In this case, of course, Jensen personally interviewed the victim and determined that she was credible before he seized Paul. Although we disagree with his assessment of A.B.'s credibility and read the applicable case law as consistent with our conclusion, none of the cases cited by the Stoots put him directly on notice that his decision to rely on A.B.'s statements, without any corroboration, was unlawful. We therefore affirm the district court's judgment that he is entitled to qualified immunity on the Stoots' Fourth Amendment claim.

II. Fifth Amendment Claims

The Stoots also allege that Jensen violated Paul's Fifth Amendment right against self-incrimination by coercing a confession during the interrogation at Paul's school. Defendants argue—and the district court held—that the Stoots cannot state a claim under the Fifth Amendment because Paul's statements were never used against him at trial. For the reasons set forth below we disagree.

A. "Use" Of A Statement In A "Criminal case"

Our consideration of this coerced confession issue begins with a fairly recent Supreme Court case, *Chavez v. Martinez*, 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003), which establishes the parameters of the problem we face but does not solve it. *Chavez* addressed whether a former criminal suspect could sue a police officer under § 1983 for coercing a confession in violation of his Fifth Amendment rights. Specifically, the police failed to give the suspect, Oliverio Martinez, any *Miranda* warnings, and interrogated him under circumstances alleged to be extremely coercive. Martinez made several incriminating statements but was never charged with any crime. *Id.* at 764, 123 S.Ct. 1994. He subsequently brought suit under § 1983 for violation of his Fifth Amendment right "not to be compelled in any criminal case to be a witness against himself" and his Fourteenth Amendment substantive due process right to be free from coercive questioning. *Id.* at 765, 123 S.Ct. 1994 (internal quotation marks omitted).

Appendix A

In a set of opinions, none of which commanded a majority on the Fifth Amendment issue, the Court held that coercive police questioning does not violate the Fifth Amendment, absent use of the statements in a criminal case. *See id.* at 766, 123 S.Ct. 1994 ("We fail to see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.") (Thomas, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.); *id.* at 777-78, 123 S.Ct. 1994 (describing "the core of the guarantee against compelled self-incrimination" as "the exclusion of any such evidence" and declining to "expand protection of the privilege . . . to the point of [ ] civil liability" in the absence of a more "powerful showing" that the conduct at issue placed this "core guarantee, or the judicial capacity to protect it," at risk) (Souter, J., joined by Breyer, J.). The Court held that unlawful police interrogation techniques might give rise to a substantive due process claim under the Fourteenth Amendment, *see id.* at 773, 123 S.Ct. 1994 (plurality opinion of Thomas, J.); *id.* at 779, 123 S.Ct. 1994 (Souter, J.); *id.* at 787, 123 S.Ct. 1994 (Stevens, J.); *id.* at 799, 123 S.Ct. 1994 (Kennedy, J.), but that the Fifth Amendment was not violated unless and until allegedly coerced statements were used against the suspect in a criminal case.

Chavez poses but does not decide the issue we face, as the Court had no occasion to explicate the sort of "use" in a "criminal case" that gives rise to a Fifth Amendment violation. The plurality stated that "a

'criminal case' at the very least requires the initiation of legal proceedings," but, as Martinez never faced criminal charges, did not decide "the precise moment when a 'criminal case' commences." *Id.* at 766-67, 123 S.Ct. 1994. Justice Souter's concurring opinion also did not discuss when a statement has been "used" in violation of the Fifth Amendment, focusing instead on Martinez's failure to demonstrate that a damages remedy was necessary in every case of police coercion to protect the Fifth Amendment right. *See id.* at 778-79, 123 S.Ct. 1994 (Souter, J., concurring).

The Stoots' Fifth Amendment claim in this case falls squarely within the gray area created by *Chavez*. Unlike Martinez, who was never charged with any crime, Paul's statements were used against him in (1) the Affidavit filed in support of the Information charging him with child molestation; (2) a pretrial arraignment and bail hearing (the CrR 3.2 hearing);[12] and (3) a pretrial

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12. Following oral argument in this case, we asked the Stoots to provide documentation supporting their assertion that Paul's statements were used against him at arraignment on July 23, 2004. The Stoots have provided us with copies of the clerk's minute entry and a transcript of the July 23 hearing, as well as a copy of Washington Superior Court Rule 3.2, which governs pretrial release. We take judicial notice of these documents and conclude, as the Stoots suggest, that the Superior Court necessarily took Paul's statements as described in the Information and supporting documents into account when setting conditions for his release. Rule 3.2 specifically requires the court to make a finding of probable cause or release the accused without conditions, and the court did so.

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evidentiary hearing (the CrR 3.5 hearing) to determine the admissibility of his confession. The question is whether these forms of reliance on Paul's statements constitute "use" in a "criminal case" under *Chavez*. We conclude that (1) and (2) above do constitute such "use."

Although we have not, after Chavez, addressed the scope of the "use" concept for Fifth Amendment purposes, other circuit courts have, with mixed results. The Third, Fourth, and Fifth Circuits have applied *Chavez* to bar recovery under the Fifth Amendment unless the allegedly coerced statements were admitted against the defendant *at trial*. *See Burrell v. Virginia*, 395 F.3d 508, 513-14 (4th Cir.2005) (holding that because plaintiff did not allege "any *trial* action that violated his Fifth Amendment rights[,] . . . *ipso facto*, his [§ 1983] claim fails") (emphasis in original); *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir.2005); *Renda v. King*, 347 F.3d 550, 552 (3d Cir.2003). Emphasizing the Court's description of the Fifth Amendment privilege against self-incrimination as a "trial right," *see Withrow v. Williams*, 507 U.S. 680, 692, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993), these courts have held "that it is the use of

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See Wash.Super. Ct.Crim. R. 3.2. To determine appropriate conditions for release, the court is to consider, *inter alia*, the "nature of the charge" based on "the available information." Wash.Super. Ct.Crim. R. 3.2(e). In this case, it appears that the only "available information" on the nature of the alleged offense was the Information and Affidavit of Probable Cause which, as noted above, included Paul's statements; the oral hearing did not involve the factual allegations concerning the offense at all.

coerced statements during a criminal trial, and not in obtaining an indictment, that violates the Constitution." *Renda*, 347 F.3d at 559; *see also Burrell*, 395 F.3d at 513-14 & n. 4.

The Seventh and Second Circuits disagree. In *Sornberger v. City of Knoxville, Illinois*, 434 F.3d 1006 (7th Cir.2006), the Seventh Circuit addressed the claims of a couple mistakenly arrested and charged with bank robbery. *Id.* at 1009-12. During their investigation police interviewed the wife, who falsely confessed to assisting her husband with the robbery but subsequently claimed that this confession was the product of psychological coercion. *Id.* at 1011. Police used this confession to support charges filed against the couple, and the trial court denied a motion to suppress after a preliminary hearing. *Id.* at 1012. Charges were subsequently dropped, and the Sornbergers then brought suit under § 1983.

Evaluating the wife's Fifth Amendment claim, the Seventh Circuit began by noting that "her 'criminal case' advanced significantly farther than did that of the *Chavez* plaintiff, who never had criminal charges filed against him at all. Teresa's statement, by contrast, allowed police to develop probable cause sufficient to charge her and initiate a criminal prosecution." *Id.* at 1025. Although the Seventh Circuit noted the Third and Fourth Circuit's decisions in *Renda* and *Burrell*, *see id.* at 1025-26, it reached the opposite conclusion:

> [W]e are satisfied that her unwarned statements were used against her in a

> 'criminal case' and in a manner that implicates the Self-Incrimination Clause. Before charges against Teresa and her husband eventually were dropped, a preliminary hearing was held to determine whether probable cause existed to allow the case against her to go to trial. Teresa's confession was offered by the prosecution to support a determination of probable cause. Her confession was then used to set the amount of bail. . . . At a subsequent arraignment on charges stemming from the . . . robbery, Teresa's confession was once again admitted before she was called upon to plead guilty or not guilty.

Id. at 1026 (footnote omitted). *Sornberger* concluded that "where, as here, a suspect's criminal prosecution was not only initiated, but was commenced *because* of her allegedly unwarned confession, the 'criminal case' contemplated by the Self-Incrimination Clause has begun. . . . This use of Teresa's confession, if the confession is indeed found to have been elicited without *Miranda* warnings, allows a suit for damages under § 1983." *Id.* at 1026-27 (emphasis in original). The court specifically "refuse[d] to hold that the right against self-incrimination cannot be violated unless a confession is introduced in the prosecution's case-in-chief at trial before the ultimate finder of fact." *Id.* at 1027 n. 15.

More recently, the Second Circuit joined the Seventh Circuit in rejecting the view that police coercion violates the Fifth Amendment only if the confession is used at

trial. In *Higazy v. Templeton*, 505 F.3d 161 (2d Cir.2007), government officials used allegedly coerced statements by Higazy as the basis for filing a criminal complaint and opposing bail. *Id.* at 167. The government later withdrew its complaint, and Higazy was released. *Id.* He then filed a *Bivens* action against federal officials. *Id.* at 168.

Although Higazy's statements were never used against him at a criminal trial, the Second Circuit held that the government's use of his statements against him at the preliminary bail hearing was a sufficient basis for alleging a violation of his Fifth Amendment rights. *Id.* at 170. "Higazy's initial appearance . . . , which included the determination of whether he would be detained or released on bail, was part of the criminal case against Higazy," held the Second Circuit, so the government's use of coerced statements at that hearing violated his Fifth Amendment rights.[13] *Id.* at 173.

We adopt the general approach of *Sornberger* and *Higazy:* A coerced statement has been "used" in a criminal case when it has been relied upon to file formal charges against the declarant, to determine judicially that the prosecution may proceed, and to determine

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13. *Higazy* reaffirmed the Second Circuit's pre- *Chavez* ruling in *Weaver v. Brenner*, 40 F.3d 527 (2d Cir.1994), which held that "use or derivative use of a compelled statement at any criminal proceeding," including grand jury proceedings, violates the declarant's rights under the Fifth Amendment. *Id.* at 535 (emphasis omitted). *Weaver* specifically held that "use of the statement at trial is not required." *Id.*

pretrial custody status. Such uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding. Here, for example, in the Affidavit of Probable Cause supporting the Information and in the arraignment hearing, defendants essentially stated, "Paul said [insert coerced statement here]," rendering Paul a witness against himself.[14] We therefore join the Second and Seventh Circuits in holding that use of the coerced statements *at trial* is not necessary for Paul to assert a claim for violation of his rights under the Fifth Amendment.[15]

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14. We do not agree with the Stoots' circular argument that Paul's statements were "used" against him at the pretrial hearing to determine the admissibility of those same statements. Because we conclude that the statements were "used" against Paul in the relevant sense in both the Affidavit of Probable Cause supporting the Information and at his arraignment, however, the fact that the statements were not "used" at the admissibility hearing is of no moment.

15. We note that our conclusion is responsive to the concerns expressed in Justice Souter's concurring opinion in *Chavez*. Justice Souter noted that his primary problem with plaintiff's argument in *Chavez* was that he "offers no limiting principle or reason to foresee a stopping place short of liability in all [cases involving coerced statements]." 538 U.S. at 778-79, 123 S.Ct. 1994. The rule we adopt today, holding that the Fifth Amendment has been violated only when government officials use an incriminating statement to initiate or prove a criminal charge, provides a sensible "stopping place." In cases like *Chavez*, where the suspect was never charged, there would be no violation. Similarly, in cases where police coerce a statement but do not rely on that statement to file formal charges or oppose bail, the Fifth Amendment would not be implicated.

B. Causation

Because Paul's rights under the Fifth Amendment were not violated until the allegedly coerced statements were used against him in an affidavit filed by the prosecutor and at arraignment, we must also decide whether the prosecutor's separate decision to rely on the statements in this manner served, as a matter of law, as a superseding cause that precludes Jensen's liability. *See Higazy*, 505 F.3d at 175; *Murray*, 405 F.3d at 289-93. Doing so, we conclude that on the present record, a jury could conclude that the use of the allegedly coerced statements against Paul was a reasonably foreseeable consequence of Jensen's decision to interrogate Paul and file a police report detailing his alleged confession, and that Jensen is therefore an appropriate defendant in this § 1983 suit.

Evaluating causation in this type of case requires us to consider two basic tort principles. *See Higazy*, 505 F.3d at 175; *Murray*, 405 F.3d at 292. On one hand, government officials, like other defendants, are generally responsible for the "natural" or "reasonably foreseeable" consequences of their actions. *Higazy*, 505 F.3d at 175 (citing *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)); *Murray*, 405 F.3d at 292. At the same time, however, liability may not attach if "an intervening decision of an informed, neutral decision-maker 'breaks' the chain of causation," meaning that the harm to the plaintiff can be traced more directly to an intervening actor. *Murray*, 405 F.3d at 292; *see also Higazy*, 505 F.3d at 175. The question is therefore

whether use of the allegedly coerced statements was reasonably foreseeable to Jensen and, if so, whether some intervening decision broke this chain of causation.

Like the other circuits to address this question, we conclude that, absent unusual circumstances, a police officer eliciting incriminating statements from a criminal suspect "could reasonably have foreseen that a coerced confession would be used against [the suspect] and would lead to [the suspect's] detention." *Higazy*, 505 F.3d at 177; *see also McKinley v. City of Mansfield*, 404 F.3d 418, 436-39 (6th Cir.2005). By the time he went to Paul's school to investigate A.B.'s allegations, Jensen viewed Paul as a suspect in a criminal case. At the interrogation, he employed the "Reid technique" to confirm his suspicion that Paul was guilty of molesting A.B. and then included several of Paul's incriminating statements in his official police report. Absent some evidence that Jensen later "attempted to prevent the use of the allegedly incriminating statements . . . or that he never turned the statements over to the prosecutor in the first place," *McKinley*, 404 F.3d at 439, a jury could infer that the subsequent uses of the statements to file criminal charges against Paul and to set conditions for his release at arraignment were reasonably foreseeable consequences of Jensen's conduct.

Given that reasonable inference, the prosecutor's decision to use the allegedly coerced statements in the affidavit and at arraignment did not serve, as a matter of law, as an intervening or superseding cause that cut off Jensen's liability. Just as a police officer may be held

liable when a prosecutor files criminal charges against a defendant without probable cause, *see Hartman v. Moore*, 547 U.S. 250, 261-63, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), so too may an officer be held liable for wrongfully procuring statements then used by the prosecutor to initiate legal proceedings, *see McKinley*, 404 F.3d at 439. Here, there is no doubt that the prosecutor acted in reliance on the information Jensen provided rather than independently, as the Affidavit of Probable Cause specifically states that it is "based entirely" on "information ... obtained through police reports and witness statements submitted by the [police department]," and "not on [the prosecutor's] personal knowledge."

We therefore join the Sixth Circuit in concluding that ordinarily, "in actions brought under § 1983 for alleged violations of [the Fifth Amendment], it is the person who wrongfully coerces or otherwise induces the involuntary statement who causes the violation of the [Fifth Amendment] privilege." *McKinley*, 404 F.3d at 439 (internal quotation omitted).

C. Qualified Immunity

Although we thus hold that the Stoots have alleged a violation by Jensen of Paul's rights under the Fifth Amendment, we also must decide whether Jensen is entitled to qualified immunity because his conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727

(internal quotation marks omitted). Defendants argue that Jensen is entitled to qualified immunity because, "[i]n light of the holding[ ] in *Chavez* . . . , a reasonable police officer would believe that a Fifth Amendment violation does not occur until the coerced statement is used against the person during the trial at which the suspect's guilt is determined." We disagree that the uncertainty resulting from *Chavez* is pertinent to the qualified immunity determination. Jensen's immunity cannot turn on whether, and in what way, a prosecutor ultimately "used" the statements allegedly coerced during Jensen's interrogation of Paul, as Jensen's role in the constitutional violation ended before that use.

At the time of the interrogation, Jensen was on notice under clearly established law that if he failed to provide Paul with appropriate *Miranda* warnings or physically or psychologically coerced a statement from Paul, the use of the confessions *could* ripen into a Fifth Amendment violation. That there was some uncertainty as to precisely what "use" in a criminal case would suffice does not matter. Qualified immunity is accorded so that reasonable officers are not deterred in carrying out their duties vigorously. *See Harlow*, 457 U.S. at 806-07, 102 S.Ct. 2727. The qualified immunity evaluation must therefore focus on an officer's duties, not on other aspects of the constitutional violation.

That the allegedly coerced confession did not "ripen" into a Fifth Amendment violation until it was "used" against Paul in a criminal case does not change this analysis, as Jensen had no reason to believe that the

statements would not be used against Paul. *See Higazy*, 505 F.3d at 174. As the Second Circuit has explained, the reasonableness of a police officer's conduct in such a case depends on whether a reasonable officer in the defendant's position "would have understood that the confession allegedly coerced from [the suspect] would have been used in a criminal case against [the suspect]," in violation of his Fifth Amendment right to be free from compelled self-incrimination. *See id.* The question, in other words, is not whether a reasonable officer could have discerned the precise meaning of "use" in a criminal case under *Chavez*, but rather whether the officer obtained the allegedly coerced statements so that they could later be used against the suspect in a criminal case.

As we have already explained in Part B above, a properly-instructed jury could find that some "use" of Paul's statements was reasonably foreseeable to Jensen at the time of the interrogation. We thus join the Second Circuit in holding that an officer is not entitled to qualified immunity where "[a] reasonable fact finder could conclude that it was not reasonable for an officer to believe that it was constitutional to coerce a confession and then to hand that information to a prosecutor—without divulging the means by which the confession was acquired—for use in a criminal case." *Id.* at 174-75.

The district court did not separately analyze the merits of the Stoots' Fifth Amendment claim, focusing instead on the uncertainty in the lower courts regarding

the meaning of "use" under *Chavez*.[16] As we explain above, the meaning of "use" was irrelevant from Jensen's perspective, as his role in the potential violation of Paul's Fifth Amendment rights was complete the moment he turned over the allegedly coerced statements to prosecutors. We therefore reverse the district court's order granting summary judgment to defendants on this claim, and remand to the district court for further proceedings consistent with this opinion.

III. Remaining Claims

The Stoots raised several additional claims in the district court, none of which have merit.

A. Substantive Due Process

First, the Stoots argue that Jensen's coercive interrogation techniques violated Paul's right to

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16. In a footnote, the district court did state that "[a] Fifth Amendment violation for a coercive interrogation was not clearly established where Detective Jensen provided Paul II with a Miranda warning, and could reasonably have believed that Paul II understood his rights." It is not clear whether the district court intended to pass on the merits of Paul's Fifth Amendment claim in this single sentence, as the district court did not provide any explanation for its conclusion that Jensen reasonably could have believed that he had complied with *Miranda* and did not specifically address the Stoots' allegations to the contrary in their complaint. Moreover, the district court did not address the totality of Stoots' Fifth Amendment claim, as, apart from their *Miranda* claim, the Stoots also allege that Jensen made improper promises to Paul and engaged in psychological coercion.

substantive due process under the Fourteenth Amendment. As noted above, *Chavez* specifically held that claims for coercive interrogation can be brought under the Fourteenth Amendment. *See* 538 U.S. at 773, 123 S.Ct. 1994 (plurality opinion of Thomas, J.); *id.* at 779, 123 S.Ct. 1994 (Souter, J.); *id.* at 787, 123 S.Ct. 1994 (Stevens, J.); *id.* at 799, 123 S.Ct. 1994 (Kennedy, J.). The standard for showing a Fourteenth Amendment substantive due process violation, however, is quite demanding. *Chavez* refers to "police torture or other abuse" as actionable under the Fourteenth Amendment, 538 U.S. at 773, 123 S.Ct. 1994, and Justice Kennedy's opinion states that "a constitutional right is traduced the moment torture or its close equivalents are brought to bear." *Id.* at 789, 123 S.Ct. 1994. Such language is consistent with the general rule that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' " and therefore a violation of substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (quoting *Collins v Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). More specifically, a Fourteenth Amendment claim of this type is cognizable only if the alleged abuse of power "shocks the conscience" and "violates the decencies of civilized conduct." *Id.* at 846, 118 S.Ct. 1708 (internal quotations omitted).

Jensen's interrogation techniques, even when construed in the light most favorable to the Stoots, did not rise to the level of a Fourteenth Amendment violation. The Stoots allege that Jensen used "improper

promises and threats. . . . [that] clearly overcame whatever will this child could have in denying these allegations." They claim that because Paul was "a developmentally delayed young boy, he could not fully and accurately comprehend if these promises were reasonable, or make an accurate assessment of the potential outcomes in the same manner as an adult." And they correctly note that under this court's precedent, *psychological* coercion is sufficient to state a claim under the Fourteenth Amendment. *See Cooper v. Dupnik*, 963 F.2d 1220, 1245 (9th Cir.1992) (en banc).

While these allegations might be relevant to the question of whether Paul's confession was in fact voluntary and therefore admissible, an issue the juvenile court resolved in Paul's favor, they fall below what is required to state a claim under the Fourteenth Amendment. Noticeably lacking, for example, is any allegation that Jensen "intended to injure[Paul] in some way unjustifiable by any government interest," as required by precedent. *Lewis*, 523 U.S. at 849, 118 S.Ct. 1708. Nor do the cases cited by the Stoots support their position. *Cooper*, for example, involved a calculated plan "to ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney . . . , to hold the suspect incommunicado, and to pressure and interrogate him until he confessed," in full recognition that such actions were unlawful under *Miranda* and would render any confession inadmissible at trial. 963 F.2d at 1224. This court described the officers' techniques as "sophisticated psychological torture" designed to "extract a confession"

after "hours of mistreatment," the "twentieth-century inquisitorial version of the Star Chamber." 963 F.2d at 1248.

As nothing in the Stoots' complaint alleges conduct of a similar nature, we affirm the district court's grant of summary judgment to defendants on the Stoots' Fourteenth Amendment claim.

B. Municipal Liability

The Stoots also assert a claim for municipal liability, arguing that the City's policies led to the violation of Paul's rights. But the Stoots have not shown that any constitutional violation was caused by a policy or custom of the City of Everett, as required to impose municipal liability. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

With regard to the Fourth Amendment claim, the Stoots allege that the City routinely violated its own policy of requiring all child victims under the age of ten to be interviewed by a child victim specialist. The Stoots maintain that the official policy demonstrates the City's awareness of "the problem of child suggestibility" in forensic interviews, and that its *de facto* policy of ignoring these guidelines shows that the City was deliberately indifferent to the risk of false allegations. This argument is unpersuasive, for two reasons.

First, as discussed above, *see supra* note 9, we have previously held that an official's mere "fail[ure] to adhere

to established guidelines and policies concerning the questioning of child witnesses" does not give rise to an independent claim under § 1983. *See Devereaux*, 263 F.3d at 1076 (internal quotations omitted). The fact that the city violated its own written policy in this regard is thus irrelevant, as that policy did not create any rights remediable under § 1983.

Second, as the district court noted, "there is no evidence that Detective Jensen was unqualified to interview A.B." Rather, the record reflects that Jensen had 280 hours of training focused on child physical and sexual abuse, and 32 hours on forensic child interviewing techniques. We therefore cannot fault any city policy or practice that permitted Jensen to interview A.B., as he appears well-qualified to have done so.

With regard to the Fifth Amendment claim, the Stoots allege that the City failed to properly train or supervise Jensen in conducting juvenile interrogations, and that the continued use of the so-called "Reid technique" of blaming the victim "amount[s] to a deliberate indifference to the need to protect the most vulnerable members of society." Again, however, the Stoots have failed to identify any case law establishing that a particular interview technique, applied to juveniles, violates their constitutional or statutory rights, nor have they identified any incident other than Paul's to corroborate their claims of deliberate indifference.

In short, the Stoots have failed to provide any evidence that the violation of Paul's rights resulted from a policy or practice of the City of Everett that repeatedly caused such violations. We therefore affirm the district court's grant of summary judgment to defendants on this claim.

C. State Law Claim for Outrage

Finally, the Stoots allege a state law claim for intentional infliction of emotional distress or "outrage." This state law cause of action requires showing, *inter alia*, "extreme and outrageous conduct" and "intentional or reckless infliction of emotional distress," *see Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291, 295 (1975), an exacting standard. "Liability exists only where the conduct has been [s]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (internal quotation omitted). Applying this standard, the Stoots' state law claim fails for the same reasons outlined above with respect to substantive due process. We therefore affirm the district court's grant of summary judgment to defendants on this claim as well.

Appendix A

Conclusion

We AFFIRM the district court's grant of summary judgment to defendants on all claims, except the Fifth Amendment coerced confession claim. With regard to that claim, we REVERSE the district court's order granting summary judgment to Jensen and remand for further proceedings. The parties shall bear their own costs on appeal.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE DATED APRIL 26, 2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C05-1983TSZ

PAUL A. STOOT, Sr., and TAMMIE L. STOOT, husband and wife, and as parents and guardians of PAUL A. STOOT II; and PAUL A. STOOT II, a minor child,

Plaintiffs,

v.

CITY OF EVERETT, a municipal corporation, and OFFICER/DETECTIVE JON A. JENSEN, and JANE DOE JENSEN and the marital community thereof,

Defendants.

April 26, 2007

ORDER

THOMAS S. ZILLY, United States District Judge.

Appendix B

I. INTRODUCTION

This matter comes before the Court on a Motion for Summary Judgment by Defendants City of Everett and Detective Jon A. Jensen, docket no. 27. The Court has considered the Defendants' Motion, the Opposition filed by Plaintiffs Paul A. Stoot, Sr., Tammie L. Stoot, and Paul A. Stoot II, the Defendants' Reply, and the supporting exhibits and declarations submitted by the parties. The Court heard oral argument from the parties on Friday, April 20, 2007, and now being fully informed enters the following Order.

II. BACKGROUND

On December 23, 2003, Ms. Nickey Johnson reported that Paul A. Stoot II ("Paul II") had sexually molested her daughter, A.B., in the summer of 2002. Compl., docket no. 8, ¶ 3.3. At the time of the allegation, Paul II was 13 years old and in the eighth grade. *Id.* ¶ 3.8. A.B. was three years old and Paul II was twelve in the summer of 2002 when the alleged molestation occurred. *Id.* ¶ 3.3. On December 23, 2003, Ms. Johnson met with Everett Police Officer Margaret Anders and provided a written statement setting forth the facts of the alleged molestation. Anders Decl., docket no. 29, Exs. A, B. According to Ms. Johnson's written statement, she opened the door to A.B.'s room and saw A.B. with her pants down rubbing her genitals. *Id.*, Ex. A. A.B. told her mom that the reason she was touching herself was because, "Paul [II] touched [her] there." *Id.* at 1. According to A.B., Paul II had pulled down his pants,

taken out his penis, pulled A.B.'s pants down and rubbed his penis on A.B.'s genital area. *Id.* Officer Anders completed a report and provided it to the detectives unit at the Everett Police Department. *Id.*, Ex. B. That ended Officer Anders' involvement in this matter.

On December 24, 2003, the file was assigned to defendant Detective Jon Jensen as a "rape of a child" investigation. Jensen Decl., docket no. 28, Ex. A. At the time of the assignment, Detective Jensen had been a police officer for approximately 24 years, had been assigned to the Special Assault Unit for five years, and had undergone approximately 280 hours of training devoted specifically to child sexual assault and abuse cases. *Id.* ¶ 2. In addition, Detective Jensen had undergone 32 hours of training focused specifically on forensic child interviewing techniques, and had conducted numerous child interviews. *Id.*

Detective Jensen interviewed Ms. Johnson and A.B. on January 8, 2004. Jensen Decl., docket no. 28, Ex. A. Detective Jensen felt that Ms. Johnson had done a reliable and accurate job of obtaining information from A.B., without "leading" or "planting" a suggested story. *Id.* ¶ 4. Detective Jensen felt A.B. had average to above-average intelligence, and possessed excellent verbal and communication skills for a child her age. *Id.*, Ex. A, at 1. Detective Jensen felt A.B. was telling the truth at all times during the interview, with regard to Paul II's actions. *Id.* ¶ 5. During the interview, A.B. stated that

Paul II put his penis on her privates, told her to "taste" his penis, and licked her vagina. *Id.*, Ex. A, at 3-4. Detective Jensen states in his declaration that he did not introduce Paul II's name into the conversation, *id.* ¶ 5, and notes that A.B. identified other members of the Stoot family, which made Detective Jensen believe she understood she was referring to Paul II as the alleged suspect. *Id.* A.B. also stated that she licked Paul II's penis and he licked her bottom. *Id.*, Ex. A, at 6.[1]

Before having any contact with Paul II, Detective Jensen spoke with Snohomish County prosecutors regarding interviews with juvenile suspects age 12 or older. From his conversations with prosecutors, Detective Jensen concluded that an interview with Paul II, without parental notification, was acceptable so long as he (1) treated a request for a parent the same as a request for counsel; and (2) gave a Miranda warning and had the juvenile sign the waiver form. *Id.* ¶ 6.

On January 15, 2004, Detective Jensen contacted Voyager Middle School, where Paul II was a student. *Id.*, Ex. A, at 7. Detective Jensen told Bry Nelson, the Principal at Voyager Middle School, that he was coming to the school to interview Paul II. *Id.* He told Ms. Nelson

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1. In addition, Detective Jensen's report reflects that A.B. made similar allegations against another boy named "Preston," alleging he "puts his poo poo in my pee pee." *See* Jensen Decl., docket no. 28, Ex. A, at 4. Detective Jensen asked a few additional questions about "Preston," but then told A.B. he "wanted to talk more about Paul and not talk about Preston anymore." *See id.*, Ex. A, at 4-5.

not to contact Paul II's parents, and that he would contact them after the interview.[2] *See id.* Paul II arrived at Principal Nelson's office, and Detective Jensen introduced himself and directed Paul II to sit at a table. *See id.* Detective Jensen gave Paul II the Everett Police Department Constitutional Rights form, and read him the *Miranda* warning. *Id.*, Ex. B. Paul II signed the waiver. Detective Jensen further recalls that he saw Paul II's name on a list of honor roll students in the Principal's office, but his recollection of the timing of this event lacks credibility.[3]

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2. Paul II's parents both worked at Greater Trinity Missionary Baptist Church in Everett, about a block from Voyager Middle School.

3. Detective Jensen's prior testimony in a hearing in the criminal proceedings against Paul II directly contradicts his sworn declaration:

> Q. At some point, did you determine how well Paul Stoot Jr. was doing in school?
>
> A. Yes. *During the point when he was writing his statement, I was walking around the principal's office* and his name was listed on an honor role [sic] in his office.
>
> Andrews Decl., docket no. 43, Ex. 9B (Testimony of Detective Jonathan Jensen). Detective Jensen's sworn declaration recollects a different version of these facts.
>
> When I entered Principal Bry Nelson's office *before interviewing Paul II*, I noticed a list on the wall indicating that Paul II was on the current honor roll.

(Cont'd)

Appendix B

Detective Jensen contends that during the interview he never yelled at Paul II or used his physical presence to intentionally intimidate him. Jensen Decl., docket no. 28, ¶ 9. Detective Jensen recalls that Paul II was calm and never cried during an interview that lasted for close to two hours. *Id.* Detective Jensen also notes that Paul II never indicated a desire to speak with his parents or an attorney. *Id.* Paul II recalls thinking he had to "just . . . sit there and do what he said," the "door being closed and the blinds being closed," and "two hours [that] seemed to last forever, with no bathroom, no break, or even a drink of water." *See* Paul II Decl., docket no. 37, at 3. Paul II did not understand that he could stop the interview, did not understand that he could have his parents with him, and did not understand that he could have an attorney with him. *See* Andrews Decl., docket no. 43, Ex. 9-D, at 134.

Detective Jensen asked Paul II about A.B.'s allegations: he asked if Paul II touched her with his penis, licked her vagina, or put his penis in her mouth. Jensen Decl., docket no. 28, Ex. A at 8. Paul II denied sexual contact with A.B. *Id.* ¶ 9. Detective Jensen utilized an interview technique of "blaming the victim" for the inappropriate activity, assuring Paul II that A.B.

(Cont'd)

> This suggested to me that Paul II would be capable of understanding the Miranda warnings and of making a voluntary and knowing waiver of his rights if he chose to do so.

Jensen Decl., docket no. 28, ¶ 7.

"probably initiated the contact and it was most likely her fault." *Id.* Paul II eventually admitted during the course of the two hour interview that he had engaged in sexual contact with A.B. *Id.* Detective Jensen alleges he did not make any promises to Paul II. *Id.* Paul II remembers being promised that charges would not be pressed if he admitted to the contact, and that he would only have to see a counselor. *See* Andrews Decl., docket no. 43, Ex. 9-D, at 135.

After Paul II's admission of sexual contact, Detective Jensen asked him to write down his version of events, which he did. Jensen Decl., docket no. 28, Ex. A, at 11. The written statement admitted that Paul II "rubbed on [A.B.'s] vagina 2 times with clothes on then one time for a couple of second [sic] with clothes off." *Id.*, Ex. C. Paul II did not sign the statement. *Id.* Detective Jensen subsequently contacted Paul II's mother and notified her that he had taken a written statement from Paul II. *Id.*, Ex. A, at 11.

On July 2, 2004, Snohomish County Deputy Prosecuting Attorney John E. Stansell filed an Affidavit of Probable Cause in the Superior Court of the State of Washington in and for Snohomish County, Juvenile Division. Christie Decl., Ex. A. Prosecuting Attorney Janice Ellis charged Paul II with Child Molestation in the First Degree. *Id.*, Ex. B. Thereafter, Paul II underwent a psychological evaluation. Judge Ronald Castleberry subsequently granted Paul II's Motion to Suppress his confession on the basis of the Court's finding that Paul II was "susceptible to being

manipulated and would not be the type that would question authority figures." *Id.*, Ex. C. Judge Castleberry also found that Paul II "did not make a knowing and intelligent waiver of his Miranda rights." *Id.* Paul II's written statement was inadmissible, and his oral statements were suppressed. During the subsequent criminal trial in December 2004, Judge Thomas J. Wynne ruled that A.B. lacked the mental capacity and memory to retain an independent recollection of the alleged 2002 molestations. Christie Decl., docket no. 30, Ex. D. Accordingly, the Court ruled that A.B. would not be permitted to testify at trial. *Id.* As a result, the charges against Paul II were dismissed with prejudice on January 7, 2005.

Plaintiffs assert causes of action for violation of Paul II's Fourth, Fifth, Sixth and Fourteenth Amendment rights under 42 U.S.C. § 1983. Plaintiffs also bring a state law claim for intentional infliction of emotional distress. The City of Everett and Detective Jensen move for summary judgment on all claims.

III. DISCUSSION

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the opposing party must show that there is a genuine issue

of fact for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must present significant and probative evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991).

In order to defeat a motion for summary judgment, the non-moving party must make more than conclusory allegations, speculations, or argumentative assertions that material facts are in dispute. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir.1994). In ruling on a motion for summary judgment, the Court may only consider evidence that would be admissible at trial, and may not consider inadmissible hearsay. *Key Bank of Puget Sound v. Alaskan Harvester*, 738 F.Supp. 398, 401 (W.D.Wash. 1989).

For purposes of this motion for summary judgment, reasonable doubts as to the existence of material facts are resolved against the moving party and inferences are drawn in the light most favorable to the opposing party. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.2000). However, if no factual showing is made in opposition to a motion for summary judgment, the district court is not required to search the record *sua sponte* for some genuine issue of material fact. *See Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir.2001) ("The district court may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record *specifically* referenced therein.") (emphasis added).

Appendix B

A. 42 U.S.C. § 1983—Detective Jensen

Personal liability under 42 U.S.C. § 1983 may follow individual involvement in unconstitutional conduct. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity, however, provides broad protection to government officials, and safeguards "all but the plainly incompetent or those who knowingly violate the law. . . ." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001). Detective Jensen contends he is entitled to qualified immunity from suit.

The Ninth Circuit follows a two-step inquiry in considering qualified immunity. The Court must first determine if the evidence, taken in the light most favorable to the plaintiff, shows that a constitutional violation occurred. *Kennedy v. City of Ridgefield*, 411 F.3d 1134, 1141 (9th Cir.2005). If a constitutional violation occurred, the Court must determine whether the law underlying the constitutional violation was "clearly established" at the time of the violation. *Id.* In this second step, the Court decides if the individual made a reasonable mistake about what the law requires. *Id.* at 1142.

1. Fifth Amendment

Plaintiffs assert that Detective Jensen violated Paul II's Fifth Amendment rights through a coercive interrogation in disregard of Paul II's right against self-incrimination. Plaintiffs allege that Paul II was not

allowed to leave the principal's office, and did not knowingly waive his *Miranda* rights. Plaintiffs allege that Paul II failed to understand his right to remain silent, did not understand his right to counsel, and was coerced into a confession through improper questioning. In support of this argument, Plaintiffs submit the testimony of Drs. Whitehill and Robinson, who opine that Paul II's "confession" looked like a classic coerced and fabricated confession. *See* Andrews Decl., docket nos. 42, 43, Exs. 9A, 9B.

In the state proceedings, Judge Castleberry concluded that "[a]t the time of the signing, it would have appeared to Detective Jensen," but that Paul II "lacked the capacity to understand his rights" and "could not make an intelligent or knowing waiver of his rights." Andrews Decl., docket no. 30, Ex. 1 (Findings & Order on CrR 3.5 Hearing) at 2. Judge Castleberry concluded that Paul II's confession was the "product of impermissible coercion," and suppressed the confession. *Id.*, Ex. 1 at 2-3. Defendants argue that even if Paul II's *Miranda* rights were violated during his interrogation in the principal's office, there is no cognizable remedy under § 1983 because the failure to give an effective *Miranda* warning does not give rise to a Fifth Amendment cause of action under § 1983. Plaintiffs contend that Paul II's Fifth Amendment rights were violated because his confession was coerced by Detective Jensen. Defendants note that Detective Jensen read Paul II his *Miranda* warning, and that Paul II signed a waiver form. *See* Jensen Decl., docket no. 28, ¶ 7.

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In *Chavez v. Martinez*, 538 U.S. 760 (2003), the Supreme Court overruled a line of cases that held a violation of Fifth Amendment rights as a result of a coercive interrogation would support a § 1983 action, even where the coerced statements were never used in a criminal proceeding. The Supreme Court rejected the view that the Fifth Amendment was offended by "coercive interrogation practices that are destructive of human dignity," *Martinez v. City of Oxnard*, 270 F.3d 852, 857 (9th Cir.2001); the Court concluded that a § 1983 claim for a Fifth Amendment violation required the use of the coerced statements in a "criminal case." *Chavez*, 538 U.S. at 765. The Supreme Court declined to define "criminal case," as used in the Fifth Amendment:

> In our view, a "criminal case" at the very least requires the initiation of legal proceedings. . . . We need not decide today the precise moment when a "criminal case" commences; it is enough to say that police questioning does not constitute a "case" any more than a private investigator's precomplaint activities constitute a "civil case."

Id. at 766-67. Thus, "the act of coercing a statement from a suspect, in and of itself, is not an act in violation of the Fifth Amendment self-incrimination clause upon which a § 1983 claim may be predicated." *Crowe v. County of San Diego*, 303 F.Supp.2d 1050, 1087 (S.D.Cal.2004). To the extent Paul II alleges a Fifth Amendment violation as the basis for his § 1983 claim, the statements from his coerced confession must have been used against him in a "criminal case."

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The parties dispute whether Paul II's statements were used against him in a "criminal case." Criminal charges against Paul II were based on his confession to Detective Jensen, and the statements of the alleged victim, A.B. However, Paul II's confession was suppressed and was not used against him at trial.

The analysis of the plurality in *Chavez* strongly suggests that the Fifth Amendment privilege is a "trial right." *See id.* at 767 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) ("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial* " (emphases added; citations omitted)); *see also Withrow v. Williams*, 507 U.S. 680, 692 (1993) (describing Fifth Amendment as a " 'trial right' ")). Based on this analysis, the district court in *Crowe* found that "criminal case," as used in the Fifth Amendment, necessarily was limited to a "criminal trial," or "a proceeding at which a defendant's guilt is determined." 303 F.Supp.2d at 1091. *Crowe* rejected the notion that use of coerced statements in grand jury proceedings, or at a hearing to determine whether the boys should be tried in adult rather than juvenile court, constituted use in a "criminal case." *Id.* at 1088.

In this case, Judge Castleberry held a hearing pursuant to Washington's Criminal Rule 3.5 (the "CrR 3.5 hearing"), for the purpose of determining the

admissibility of Paul II's confession. Andrews Decl., docket no. 42, Ex. 9 (Transcript of Proceedings). Detective Jensen, Paul II, and various experts testified regarding Paul II's understanding of his waiver of rights, at the time of his confession. *See* Andrews Decl., docket no. 33, Ex. 1 (Findings and Order on CrR 3.5 Hearing). Judge Castleberry concluded the statements were the "product of impermissible coercion," and suppressed all statements by Paul II. *Id.* Plaintiff argues that Paul II was compelled to be a witness against himself, in a criminal case, because he was faced with his own confession at the CrR 3.5 hearing. However, like the pretrial hearing and grand jury proceedings in *Crowe*, Paul II was not forced to confront his coerced statements in a criminal proceeding where his guilt would be determined. Rather, the pretrial CrR 3.5 hearing merely determined the admissibility of the statements in future proceedings.

The fact that the hearing could have ultimately led to Paul II's confronting his own incriminating statements at trial, in violation of the Fifth Amendment, does not itself effect a constitutional violation. *See Verdugo-Urquidez*, 494 U.S. at 264 ("Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial . . ."). The CrR 3.5 hearing is not unlike the 707 hearing considered in *Crowe:* the guilt of the defendant was ultimately not at issue. The Court finds "criminal case," as used in *Chavez*, means "criminal trial," a proceeding at which a defendant's guilt is determined. Accordingly, Paul II has failed to make out

a cognizable § 1983 claim for violation of his Fifth Amendment privilege against compelled self-incrimination, and Defendants are entitled to summary judgment on this claim.[4]

2. Sixth Amendment Rights

The Complaint alleges that Paul II was deprived of his right to counsel. Compl., docket no. 8, ¶ 4.2(d). The Defendants interpret this as a § 1983 claim pursuant to

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4. Even if the Court were to find that Paul II's Fifth Amendment rights were violated, the Court would find that the violation of his rights was not clearly established in light of *Chavez*.

> Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.

Chavez, 538 U.S. at 773. A Fifth Amendment violation for a coercive interrogation was not clearly established where Detective Jensen provided Paul II with a Miranda warning, and could reasonably have believed that Paul II understood his rights. Andrews Decl., docket no. 30, Ex. 1 (Findings & Order on CrR 3.5 Hearing) at 2. Accordingly, even if Detective Jensen made a mistake as to what the law required, Detective Jensen is entitled to qualified immunity from suit for claims regarding his violation of Paul II's Fifth Amendment rights.

the Sixth Amendment right to counsel, which attaches only after an adversarial proceeding is commenced. *See Massiah v. United States*, 377 U.S. 201, 206 (1964). Defendants move for summary judgment on the grounds that no criminal proceedings were brought at the time of the interview. Plaintiffs do not respond. The Court finds no violation of Paul II's Sixth Amendment rights. Defendants are entitled to summary judgment on this claim.

3. Fourth Amendment Rights

Plaintiffs also assert that Detective Jensen violated Paul II's Fourth Amendment rights because he "lacked probable cause to arrest or custodially interrogate Paul II at his school. . . ." *See* Response, docket no. 32, at 15. Plaintiffs assert that any detention of Paul II was in violation of his Fourth Amendment rights. Defendants counter that the questioning of Paul II at his school was not a custodial interrogation or arrest, and that any arrest was supported by probable cause.

(a) Custodial interrogation.

Plaintiffs Fourth Amendment claims are based on the presumption that Paul II was "arrest[ed] or custodially interrogat[ed] . . . at his school." If Paul II's questioning at the school was not custodial, Plaintiffs' § 1983 claim for a violation of Fourth Amendment rights cannot stand. Defendants argue that Paul II was not under arrest or in custody during his questioning at the school. The Defendants contend there is no evidence

Paul II was threatened if he refused to speak with Detective Jensen, no evidence Paul II asked to leave, and no evidence that Detective Jensen refused to let him leave.

In determining whether an individual was in custody, "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*quoting Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994). The Court considers "how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

Detective Jensen explained to Paul II that he was "required" to read *Miranda* rights before he could talk to him. Jensen Decl., docket no. 28, Ex. A, at 13. This could have led a reasonable student to believe he was in custody or under arrest. Indeed, Paul II states in his declaration that he "thought [he] just had to sit there and do what [Detective Jensen] said." Paul II Decl., docket no. 37, at 3. Moreover, Detective Jensen understood from his discussions with prosecuting attorney John Stansell that *Miranda* warnings were required "since the interview was to take place at a school where the child was not free to leave." Jensen

Decl., docket no. 28, ¶ 6. Taking every inference in favor of the non-moving party, the Court must conclude that Paul II's questioning was custodial. *See, e.g., State v. D.R.*, 84 Wn.App. 832, 838, *review denied*, 132 Wn.2d 1015 (1997) (holding D.R. was in custody when questioned by a detective, in the principal's office, at his school because the detective did not inform him he was free to leave, D.R. was only 14-years-old, the principal's office is a naturally coercive environment for children of his age, and the interrogation was accusatory in nature).

(b) Probable cause.

The Defendants argue that even if Paul II's interrogation was custodial, it was not improper because there was probable cause to believe Paul II committed a crime. *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985). Probable cause exists where, "under the totality of circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." *United States v. Potter*, 895 F.2d 1231, 1233-34 (9th Cir.1990).

Defendants claim that Detective Jensen had probable cause because the conduct alleged by A.B. and her mother met the definition of child molestation in the first degree and because Detective Jensen was acting pursuant to A.B.'s claim that Paul II touched her vagina. Plaintiffs argue that Detective Jensen's investigation was based only on mere suspicion after the

"confused statement" of a "very young girl." Plaintiffs cite to numerous deficiencies in Detective Jensen's interview of A.B., including the questions he asked and the answers given by A.B. Detective Jensen contends that the hearsay statements of A.B. to her mother and his own interview of A.B. establish probable cause.

On December 19, 2003, A.B.'s mother walked into the room where A.B. was playing and "she had her pants down and was touching her self (sic)." Anders Decl., docket no. 29, Ex. B (Johnson Statement) at 1. A.B.'s mother questioned her about what she had been doing.

> [A.B.] said [Paul] pulled down his pants & pulled his little thing out & pulled her pants down & put it on her. I asked did it hurt she said no. I said did it go inside? she said no? I asked where the pastor was she said not @ home and tammie the (mom) was @ the church. Annessa the 16 year old daughter was down stairs and [A .B.] and Paul were in the room.
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> * * *
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> I said did he say anything when he did this? she said don't tell people or mommy? *Id.*, Ex. B at 1-2. On December 23, 2003, Everett police officer Margaret Anders spoke with A.B.'s mother. Officer Anders made an initial report which recounted the statements by A.B. to her

mother, which was forwarded to Detective Jensen. *Id.*, Ex. B at 3.

Detective Jensen interviewed A.B. on January 8, 2004. Jensen Decl., docket no. 28, Ex. A. Detective Jensen's interview of A.B. took place approximately 18 months after the alleged sexual molestation by Paul II. Detective Jensen felt A.B. had average to above-average intelligence, and possessed excellent verbal and communication skills for a child her age. *Id.*, Ex. A, at 1. Detective Jensen felt A.B. was telling the truth at all times during the interview, with regard to Paul II's actions. *Id.* ¶ 5. A.B. stated that Paul II put his penis on her privates, told her to "taste" his penis, and licked her vagina. *Id.*, Ex. A, at 3-4. Detective Jensen's report indicates he did not introduce Paul II's name into the conversation, *id.* ¶ 5, and that A.B. distinguished other members of the Stoot family. *Id.* A.B. also stated that she licked Paul II's penis and he licked her bottom, and she identified the location in the Stoot home where the alleged sexual molestation took place. *Id.*, Ex. A, at 9. A.B. also identified "Preston" as another child that she had previous sexual contact with. *Id.*, Ex. A, at 11.

Courts have generally permitted law enforcement officers to establish probable cause based only on the testimony of a sexual assault victim, without additional corroborating evidence, even when the evidence is contradictory. Absent an indication to the contrary, a police officer is entitled to rely upon information supplied by the victim of an alleged sexual assault. *E.g. Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir.1987);

Easton v. City of Boulder, Colo., 776 F.2d 1441, 1449-50 (10th Cir.1985). In *Easton*, the Court expressly noted that the accusations of three and five year old children contained "significant" discrepancies, and the possibility that the testimony would be inadmissible in court. However, the Court held that the children's accusations established probable cause. *Easton*, 776 F.2d at 1449-50. Underlying *Easton* was the realization that in many child molestation cases, the only available evidence is the testimony of children. *See id.*

Under the circumstances of this case, whether Detective Jensen had probable cause to believe Paul II committed the crime of child molestation presents a difficult and close question. However, at oral argument Defendants' counsel conceded—for purposes of the qualified immunity analysis, at least—that reasonable minds could differ as to whether Detective Jensen had probable cause to arrest Paul II before the questioning at the school.[5] If Detective Jensen did not have probable cause, then a custodial interrogation of Paul II was in violation of his Fourth Amendment rights.

Because Defendants concede that reasonable minds could differ with regard to whether Detective Jensen had probable cause, the Court proceeds to the second step of the *Saucier* analysis and must determine whether the law underlying the constitutional violation

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5. The Court asked Mr. Christie: "You would concede it's factual as to whether there was probable cause to arrest before the interview?" Mr. Christie responded: "Reasonable minds could differ on that." Rough Tr. at 10.

was "clearly established" at the time of the violation. *Id.* In this second step, the Court decides whether Detective Jensen made a reasonable mistake about what the law requires. *Id.* at 1142.

(c) Clearly established.

Taking every inference in favor of Paul II, Detective Jensen did not have probable cause before the interview and Paul II's custodial interrogation was in violation of his Fourth Amendment rights. If Detective Jensen made a reasonable mistake about what the law requires, however, he is still entitled to qualified immunity.

A police officer is generally entitled to rely on information supplied by the victim of an alleged sexual assault. *Clay*, 815 F.2d at 1168. Courts have not distinguished between first-hand accusations made by three and five year old children, even where the testimony contains discrepancies. *Easton*, 776 F.2d at 1449-50. Probable cause does not follow hearsay statements by parents as to what they were told by two-year old and three-year old sexual assault victims. *Shaw*, 464 F.3d at 625; *Cortez*, 478 F.3d at 1119-20. However, *Shaw* suggests that an interview of a child sexual assault victim may be required to establish probable cause. *See Shaw*, 464 F.3d at 626. Detective Jensen interviewed the alleged victim in this case. To the extent Detective Jensen violated Paul II's rights by questioning him in a custodial situation without probable cause, he reasonably could have believed his conduct was lawful. A reasonable officer in Detective Jensen's position could

have believed that the statements by the victim established probable cause, notwithstanding the significant amount of time between the accusations by A.B. and the alleged molestation, and A.B.'s young age. Accordingly, Detective Jensen is entitled to qualified immunity with regard to Paul II's § 1983 claims for violation of his Fourth Amendment rights, and is entitled to summary judgment on this claim.

4. Fourteenth Amendment Rights

Plaintiffs assert that Detective Jensen violated Paul II's Fourteenth Amendment rights by coercing his confession and by destroying notes taken by the Detective during the interview. In order for conduct to sustain a claim under the Fourteenth Amendment it must "shock the conscience" and violate the "decencies of civilized conduct." *See County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). The Constitution does not guarantee "due care" on behalf of government officials: liability for negligently inflicted harm falls beneath the threshold of constitutional due process. *Id.* at 848-49.

Defendants note that conduct far more shocking and coercive than the allegations in this case has been found not to violate the Fourteenth Amendment:

> While it is true that the interrogation lasted for eight hours, [interrogator] Perez did not refuse to give Cunningham a break for food or water. Perez also never yelled and failed to use violence or the threat of violence. Perez's

> questions may have unsettled Cunningham, but mere emotionalism and confusion do not invalidate confessions. Further, continuing to question a suspect after the suspect claims he is innocent does not constitute coercion and is often necessary to achieve the truth. Perez's suggestion that Cunningham's cooperation could lead to treatment rather than prison is also not coercive. Similarly, Perez's statement that he has put people in prison did not contribute to undermining Cunningham's free will. Officers are allowed to recite the sentence a suspect may receive if found guilty.

Cunningham v. City of Wenatchee, 345 F.3d 802, 810 (9th Cir.2003) (internal citations omitted). Promises, threats, and coercion of the type which form the basis of Plaintiffs' Fourteenth Amendment claim have been considered by the Ninth Circuit; such claims have not been held to form the basis for a Fourteenth Amendment violation.

While the Court considers the fact that Paul II was a minor, the conduct at issue in this case is far less egregious than the conduct outlined in *Cunningham*. Detective Jensen's conduct cannot be said to "shock the conscience." Judge Castleberry noted in his Order from the CrR 3.5 hearing that:

> 18. At the time of the signing, it would have appeared to Detective Jensen that Defendant understood his rights; however, Defendant

> lacked the capacity to understand his rights and the Defendant could not make an intelligent or knowing waiver of his rights. The general rule is that a child over the age of 12 may be interviewed without presence of parents and may make a waiver of rights.

Andrews Decl., docket no. 30, Ex. 1 (Findings & Order on CrR 3.5 Hearing) at 2. Under all the circumstances, and taking every inference in Paul II's favor, Detective Jensen did not violate his Fourteenth Amendment rights through an unduly coercive or improper interrogation.[6] Because the Court finds no constitutional violation, the Court does not reach the second step of the *Saucier* analysis.

Detective Jensen is entitled to qualified immunity from suit and summary judgment is therefore granted in his favor on all claims under 42 U.S.C. § 1983.

B. 42 U.S.C. § 1983—City of Everett

Plaintiffs also assert claims against the City of Everett under § 1983. There is no *respondeat superior*

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6. Plaintiffs also allege that Detective Jensen violated Paul II's Fourteenth Amendment rights by destroying his notes of the interrogation. This claim, however, was not plead in the Complaint and cannot be raised for the first time at summary judgment. Moreover, similar claims have been rejected by the Ninth Circuit. *Cunningham*, 345 F.3d at 812 ("failure to preserve or collect potential exculpatory evidence does not violate the Due Process Clause unless the officer acted in bad faith.").

liability under § 1983; local government units may only be sued for injury where the constitutional deprivation arises from a government custom or official policy. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691-92 (1978). Absent a constitutional violation, there can be no municipal liability under § 1983. *Id.* at 692. Considering the facts of this case in the light most favorable to the Plaintiffs, Detective Jensen violated Paul II's Fourth Amendment rights when he questioned him in a custodial situation without probable cause. Under *Monell*, however, municipal liability requires a government custom or official policy which resulted in the violation. *See Monell*, 436 U.S. at 691.

Plaintiffs allege two unconstitutional policies which they allege subject the City of Everett to liability under § 1983. Plaintiffs first urge that the City, as a matter of course, disregarded its own policy to require a child victim specialist to interview young children. Detective Jensen conducted "scores" of child sexual assault interviews, and Plaintiffs allege that the City of Everett's choice to use Detective Jensen—a "street detective"—in lieu of a trained specialist was an unconstitutional policy and custom that resulted in a violation of Paul II's constitutional rights. However, this argument is unsupported in law or fact. The Ninth Circuit has explicitly held in the sexual abuse context that "no constitutional due process right to have child witnesses, in a child sexual abuse investigation, interviewed in a particular manner or pursuant to a certain protocol." *Devereaux v. Perez*, 218 F.3d 1045, 1053 (9th Cir.2000). Moreover, there is no evidence that

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Detective Jensen was unqualified to interview A.B. The evidence before the Court is that Detective Jensen had 280 hours of training focused on child physical and sexual abuse, and an additional 32 hours of training on forensic child interviewing techniques. Jensen Decl., docket no. 28, ¶ 2. In light of Detective Jensen's training and *Devereaux*, there is no basis for Plaintiffs' claim that the City of Everett had an unconstitutional policy or custom that resulted in a violation of Paul II's constitutional rights.

Plaintiffs second argument is that the City failed to properly train and supervise Detective Jensen with regard to his interview of juveniles. Plaintiffs contend that City policies for interrogation of juvenile suspects were "likely to lead to improper interrogations and false confessions in violation of the constitution," because they did not record interrogations. However, no constitutional violation resulted from Detective Jensen's questioning. *See Cunningham*, 345 F.3d 802. A constitutional violation, if any, resulted from Detective Jensen's reasonable, but mistaken, view that his interview of A.B. established probable cause for the custodial interview of Paul II.

Plaintiffs have failed to identify facts in support of their claim that a government custom or policy resulted in a violation of Paul II's constitutional rights; accordingly, Plaintiffs' § 1983 claims against the City of Everett are barred. *See Monell*, 436 U.S. at 691-92.

C. Outrage

Plaintiffs have also asserted a cause of action against Detective Jensen and the City of Everett for intentional infliction of emotional distress ("outrage"). The tort of outrage requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress. *See, e.g.*, *Kloepfel v. Bokor*, 149 Wash.2d 192, 195-96 (2003). A claim for intentional infliction of emotional distress must be predicated on behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wash.2d 52, 59 (1975). The tort of outrage "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* Plaintiffs "must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration." *Id.*

The Court must first determine if the conduct complained of may reasonably be regarded as extreme and outrageous, thus warranting a factual determination by the jury. *E.g. Robel v. Roundup Corp.*, 148 Wash.2d 35 (2002). The Courts have set a high standard for sufficiently outrageous conduct. *Id.* at 49 ("[T]he standard for an outrage claim is admittedly very high (by which we mean that the conduct supporting the claim must be appallingly low) . . ."). The tort is sustainable only where the conduct is extreme and

outrageous. *Kloepfel*, 149 Wash.2d 192 (harassment and death threats, including hundreds of phone calls over a course of years was sufficiently outrageous); *Robel*, 148 Wn.2d 35 (harassing and calling an injured employee "bitch" and the C-word, "acting out" fake back injuries, and pretending to call L & I was sufficiently outrageous). Courts have refused to extend the tort of outrage to insults, threats and minor indignities. *Grimsby*, 85 Wash.2d at 59.

Under all the circumstances of this case, Detective Jensen's actions cannot reasonably be characterized as "atrocious," or "utterly intolerable in a civilized community." Detective Jensen's interrogation of Paul II was undertaken after his interview with A.B., who had identified Paul II as engaging in illegal sexual contact with her. Detective Jensen's actions were undertaken during the course of legitimate police business and cannot be described as "outrageous in character" or "extreme in degree." Accordingly, the Defendants are entitled to summary judgment on this claim.

III. CONCLUSION

For the reasons stated in this Order, Defendants' Motion for Summary Judgment, docket no. 27, is GRANTED. The Clerk is directed to enter judgment in favor of Defendants dismissing this case with prejudice.

IT IS SO ORDERED.